

*Sword or Feather?*  
The use and utility of suspended  
sentences in Tasmania

by

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## **ABSTRACT**

This thesis explores the use and utility of suspended sentences in Tasmania. Suspended sentences are currently available as a sentencing disposition in all Australian jurisdictions, but there is conflict between public and legal perceptions about the severity of the sanction, which may contribute to a lack of public confidence in the criminal justice system as a whole. The following issues are explored: How are suspended sentences used by judges and magistrates? What is the process for imposing a suspended sentence? How effective are suspended sentence as a specific deterrent or rehabilitative measure? How are breaches dealt with?

The study examines the history of suspended sentences and the arguments for and against their use, as well as considering the principles and practice governing their use in Australia and overseas. In-depth interviews with Tasmanian judges and magistrates provide an invaluable source of information on judicial views on a range of issues pertaining to the use of suspended sentences. A quantitative analysis presents empirical information on the use of suspended sentences in the Supreme and Magistrates' Courts, while a qualitative analysis of sentencing remarks in the Supreme Court examines the relevance of a range of sentencing factors to the decision to suspend. The findings of a reconviction analysis are presented, indicating that suspended sentences may be an effective deterrent. Finally, a breach analysis examines offending conduct in breach of a suspended sentence, explores prosecution practices in respect of breaches and analyses judicial sentencing remarks in breach cases. The conclusion reviews the key findings and discusses how they support the main arguments for and against suspended sentences. The practical and policy implications of my findings are also considered. My research is not only of significance for Tasmania, but also has relevance and resonance for the Australian and international use of suspended sentences and will inform broader discussions about the utility of this sentencing option.



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# INTRODUCTION

## Purpose and themes

This thesis explores the use and utility of suspended sentences in Tasmania. Suspended sentences are currently available as a sentencing disposition in all Australian jurisdictions, but there is conflict between public and legal perceptions about the severity of the sanction, which may contribute to a lack of public confidence in the criminal justice system as a whole. My research examines the arguments for and against suspended sentences and discusses the principles and practice for their use in Australia and overseas. Quantitative and qualitative information is presented about the use of suspended sentences in Tasmania, while interviews shed light on judicial thinking about such sentences. My findings on reconviction and breach rates are analysed and the policy and practical implications of my findings considered. This thesis makes a vital contribution to understanding a highly controversial sentencing disposition.

The topic for this thesis arose out of an Australian Research Council Linkage-Project between the University of Tasmania and the Tasmanian Department of Justice entitled *An Evaluation of the Use of Suspended Sentences*. Accordingly, the key areas for analysis were informed by, although not restricted to, the stated aims of the project in the application for funding from the ARC, as set out in Appendix A. In this thesis, I sought to answer the following research questions: How are suspended sentences used by judges and magistrates? What is the process for imposing a suspended sentence? How effective are suspended sentence as a specific deterrent or rehabilitative measure? How are breaches dealt with?

This thesis also examines the incidence of net-widening and sentence inflation and the impact of suspended sentences on the prison population; the use of suspended sentences for serious offences; measures to increase the punitive and rehabilitative effect of the sentence; the role of public opinion and the importance of communication – not only with offenders and the public, but also with judicial officers, prosecutors and the media.

## Overview of methodology

The questions of how judicial officers use suspended sentences and the process for imposing such a sentence are answered against the backdrop of an analysis of the relevant Australian case law. More significantly, I give judges and magistrates a rare opportunity to explain their reasoning and use of suspended sentences in their own words through in-depth interviews. I also undertake a quantitative analysis of all sentences imposed in the Magistrates' Court in a one-year period and in the Supreme Court in a two-year period in order to present empirical data on patterns of use. This is supplemented by a qualitative analysis of the comments on passing sentence for all suspended sentences imposed in the Supreme Court over the same two year period to examine the factors cited in support of the decision to suspend the sentence.

Suspended sentences are often supported on the basis that they constitute an effective deterrent or rehabilitative measure. Critics, by contrast, regard such sentences as a

mere slap on the wrist. There is currently no published research in Australia which examines reconviction rates following a suspended sentence. I therefore explore the effectiveness of suspended sentences by conducting a reconviction analysis of all offenders sentenced in the Supreme Court in a two-year period.

The consequences flowing from breach are intrinsic to the impact of suspended sentences. There is a strong argument for certainty that a breached sentence will be activated, but there is also a need for judicial and administrative discretion. I examine this issue by conducting an analysis of the offences committed in breach by all offenders in receipt of a partly or wholly suspended sentence over a two year period in the Supreme Court.

## **Thesis structure**

**Chapter 1** explains what a suspended sentence is and introduces some key aspects of sentencing in Tasmania. It sets out the history of suspended sentences and examines the principal arguments for and against the use of suspended sentences.

In **Chapter 2**, I set out the legislative provisions and case law on suspended sentences in Australia, as well as presenting data on the use of such sentences. I discuss the main High Court case on this issue and the process for imposing a suspended sentence. The provisions on the length of sentence and operational period which can be imposed are also considered. Provisions which increase the ‘bite’ of the suspended sentence by way of attaching conditions or combination orders are reviewed and the provisions for action on breach and partly suspended sentences discussed. Finally, information is presented on the use of suspended sentences in England, New Zealand and Canada.

**Chapter 3** presents a qualitative analysis of my findings from interviews with the Tasmanian judiciary on their use of suspended sentences. These interviews provide an invaluable source of information on judicial views on a range of issues pertaining to the use of suspended sentences, including their purposes and objectives; the process for imposing a suspended sentence; information about such sentences; the role of public opinion and the media; breaches of order; partly suspended sentences and Commonwealth recognizance release orders; and options for reform.

**Chapter 4** provides a quantitative analysis of the use of suspended sentences in the Supreme and Magistrates’ Courts. Data on frequency of use, the length of sentences and operational periods is presented and the incidence of possible sentence inflation and net-widening examined. Sentencing dispositions are analysed by offence type, prior criminal record, age, gender and judicial officer imposing the sentence. The offences for which an offender is most likely to receive a suspended sentence and the offences for which such sentences are most commonly imposed are also examined.

**Chapter 5** builds on the quantitative analysis in Chapter 4 by undertaking a qualitative analysis of partly and wholly suspended sentences imposed in the Supreme Court. The importance of reasons for sentence is discussed and the relevance of a range of sentencing factors to the decision to suspend a sentence considered. In particular, factors relating to the offender; factors relating to the offence; the response to the charges and the effect of the offence and sanction are



examined. In addition, cases which suggest an improper reasoning process was applied in exercising the discretion are reviewed.

In **Chapter 6**, I present the findings of a reconviction analysis of offenders sentenced in the Supreme Court. This analysis compares reconviction rates on the basis of sentencing disposition and considers the relevance of age, gender, prior criminal record and offence type. Changes in the seriousness and frequency of offending are examined and the relevance of pseudo-reconvictions discussed. Reconviction outcomes for suspended sentences imposed in combination with other orders are also considered.

**Chapter 7** presents a breach analysis of offenders who received a suspended sentence in the Supreme Court. Details of breach prosecutions are analysed and information on the nature of the offences committed in breach discussed. Breaches are also analysed by offence type, prior record, age, gender and length of sentence and operational period. Comments on passing sentence in the cases where breach action was taken are also discussed in an attempt to develop a clearer understanding of the applicable principles on breach proceedings.

In the **Conclusion**, I review the key findings of the project and discuss how these findings support the arguments for and against suspended sentences. I also make some suggestions for improving the use of suspended sentences in Tasmania. My findings confirm that, notwithstanding their limitations, suspended sentences remain a ‘valid and sound method of non-institutional reaction against crime, based on consideration of the personality of the offender’.<sup>1</sup> My research is not only of significance for Tasmania, but also has relevance and resonance for the Australian and international use of suspended sentences and will inform broader discussions about the utility of this sentencing option.

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<sup>1</sup> Marc Ancel, *Suspended Sentence*, Heinemann, London (1971), 72.

# 1. BACKGROUND TO SUSPENDED SENTENCES

*What, then, is the suspended sentence? Is it a let-off, or is it the most serious penalty available to the courts, technically held in abeyance? Is it a custodial or non-custodial sentence? Is it only appropriate for 'extremely carefully selected' cases or is it of much more general application? There are no very clear answers to these questions in the everyday practice of the criminal courts.<sup>1</sup>*

## 1.1 Introduction

A suspended sentence is a fixed term of imprisonment, the execution of which has been partly or wholly suspended. As such, it is an inchoate sanction<sup>2</sup> which threatens future harm for past criminal conduct<sup>3</sup> and has been described as a Sword of Damocles hanging over the offender's head.<sup>4</sup> The imposition of a suspended sentence involves two key steps, namely, imposing a fixed term of imprisonment and then ordering that all or part of the term be held in suspense for a specified period ('the operational period'), subject to certain conditions. For the purposes of clarity, Table 1-1 sets out the features of key conditional sentencing dispositions, including suspended sentences.

*Table 1-1: Key features of conditional sentencing dispositions*

Sentencing disposition	Key features
Suspended sentence (Australia/UK/New Zealand)	A prison sentence which is wholly or partly suspended for a specified period of time, subject to certain conditions. If breached, the court may order all or part of the sentence to be served in custody.
Conditional sentence of imprisonment (Canada)	A prison sentence which is served in the community. If breached, the court may only order the offender to serve the unexpired term of imprisonment in custody.
Suspended sentence (Canada)	The court suspends passing a sentence and releases the offender on conditions as prescribed in a probation order.
Conditional release (Australia)	The court releases the offender, with or without supervision, subject to the offender giving an undertaking to comply with certain conditions for a specified period of time.

To put suspended sentences in their Tasmanian, Australian and international context, this Chapter sets out some of the key features of sentencing in Tasmania and the history of suspended sentences. The arguments for and against suspended sentences are also analysed.

<sup>1</sup> Anthony Bottoms, 'The Suspended Sentence in England: 1967-1978' (1981) 21 *British Journal of Criminology* 1, 16.

<sup>2</sup> Martin Wasik, 'The Problem of Conditional Sentences' (1994) 13(1) *Criminal Justice Ethics* 50, 51. See also Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 5.

<sup>3</sup> Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535, 535. The threat has been described as 'precise and, in a sense, calculated': Marc Ancel, *Suspended Sentence*, Heinemann, London (1971), 24.

<sup>4</sup> See eg *R v Locke and Paterson* (1973) 6 SASR 298, where Bray CJ remarked, 'Anyone released under a suspended sentence therefore knows, or ought to know, that the sword of Damocles hangs over his head and that only his continued good behaviour and observance of the bond can prevent his automatic incarceration under the suspended sentence': 301.

## 1.2 Sentencing in Tasmania

Tasmania has traditionally had one of the lowest rates of imprisonment in Australia, coupled with high rates of community sanctions, such as probation and community service orders.<sup>5</sup> In absolute terms, Tasmania still has one of the smallest prison populations, but the imprisonment rate has increased dramatically in recent years, from 82 prisoners per 100,000 people in 1996 to 141 in 2007, down from a record high of 150 in 2005.<sup>6</sup> By way of comparison, the national rate of imprisonment in 1996 was 132 and this has risen fairly steadily to a high of 169 in 2007.<sup>7</sup>

Sentencing law in Tasmania is governed by the *Sentencing Act 1997* (the Act), which came into effect on 1 August 1998. The Act did not codify the law of sentencing<sup>8</sup> and according to the Court of Criminal Appeal in *Langridge*,<sup>9</sup> it did not alter the common law in relation to suspended sentences. In this section, I present a brief overview of sentencing in Tasmania.<sup>10</sup> In particular, it is important to note two features which Warner describes as ‘peculiar to this State’, namely:

First, rather than providing individual maximum penalties for indictable offences, the Criminal Code in s 389 provides a general penalty provision of imprisonment for 21 years, or a fine of no specific maximum, or both. Secondly, in dealing with indictments or complaints containing multiple counts, the Supreme Court has the

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<sup>5</sup> See Parliament of Tasmania Legislative Council Select Committee, *Correctional Services and Sentencing in Tasmania*, Hobart (1999) (Wing Committee), 31; John Walker, *Tasmanian Prison Projections 2000-2019*, Crimes Trends Analysis, Queanbeyan (2000), 9 and The Hon Peter Patmore, ‘Key Issues - The Government's Perspective’ (Paper presented at the Beyond Imprisonment Conference Proceedings, Hobart, 21 September 2000), 11.

It has recently been suggested that Tasmania is ‘the safest State according to the latest figures released by the Australian Bureau of Statistics’: Tasmania Police, ‘Tasmania Safest State in the Nation’ (*Press Release*, 19 June 2007).

<sup>6</sup> Australian Bureau of Statistics, *Prisoners in Australia*, Cat No 4517.0, Canberra (2007) (ABS), Table 4.

Possible reasons for this recent expansion include the effects of longer sentences and changes to non-parole legislation, as well as more people being imprisoned on remand and for non-payment of fines: see Tasmanian Department of Justice and Industrial Relations, Corrective Services Division, *Submission to Legislative Council Select Committee on Correctional Services and Sentencing in Tasmania, Overview and First Terms of Reference*, Hobart (1998); Neil Morgan, *Sentencing Trends for Violent Offenders in Australia*, Crime Research Centre, University of Western Australia (2002), [3.18] and Maria Borzycki, *Interventions for Prisoners: Returning to the Community*, Australian Institute of Criminology, Canberra (2005), 6.

<sup>7</sup> ABS, *ibid*. See also Steering Committee for the Review of Government Service Provision, *Report on Government Services*, Productivity Commission, Canberra (2008), Table 8A.1, 8.A5.

<sup>8</sup> Section 6 provides that the Act ‘is a consolidation, not a codification, of the State’s sentencing law and it does not derogate from the powers that a court may exercise, or the rights that a person may have, under any other enactment or law for or in relation to the sentencing of offenders’. The Act effectively consolidated the *Criminal Code Act 1924* (Tas), *Justices Act 1959* (Tas), *Mental Health Act 1963* (Tas) and *Probation of Offenders Act 1973* (Tas). For key provisions of the Act, see Appendix B.

<sup>9</sup> *Langridge v The Queen* (2004) 12 Tas R 470, [29].

<sup>10</sup> For further information, see Wing Committee, n 5; Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (2nd ed, 2002) and Kate Warner, *Sentencing*, Issues Paper No 2, Tasmania Law Reform Institute, Hobart (2002) (Sentencing IP).

## 1. Background to suspended sentences

power, which is frequently exercised, of passing one sentence on the whole indictment or complaint rather than separate sentences.<sup>11</sup>

There are two significant issues arising from this framework. The first relates to the lack of legislative guidance when it comes to maximum penalties for offences dealt with on indictment in the Supreme Court.<sup>12</sup> The maximum penalty for murder and treason is life imprisonment.<sup>13</sup> For all other offences dealt with on indictment, the legislative maximum penalty is 21 years.<sup>14</sup> This approach has been described as a ‘highwater mark in broad judicial discretion’, which has the ‘advantage of simplicity and flexibility but the obvious disadvantage that, without some limits on it, like cases may not be treated alike’.<sup>15</sup> The second issue relates to section 11 of the Act, which provides that when the court is sentencing an offender who has been convicted of more than one offence, it may either impose separate sentences for each count or a ‘global’ or general sentence, which is ‘a sentence intended by the judge to cover more than one count’.<sup>16</sup> This approach contributes to judicial flexibility and was described in *DPP (Tas) v Farmer*<sup>17</sup> as ‘the course that is ordinarily adopted in this State’ when dealing with multiple counts; it is also commonly used in the context of federal offences.<sup>18</sup>

There are other anomalies in Tasmanian sentencing law. Tasmania is the only State that does not give statutory recognition to the principle of restraint in the use of

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<sup>11</sup> Warner, *ibid*, [1.102].

<sup>12</sup> Indictable offences must generally be heard and determined in the Supreme Court. However, in some cases, based upon the amount involved or the election of the defendant, certain indictable offences will be heard in the Magistrates’ Court: *Justices Act 1959* (Tas), Part VIII. For discussion of the scope of these provisions, see *R v Minney* (2003) 12 Tas R 46, [24]-[28]. See also Magistrates Court (Tasmania), *Annual Report 2005-2006*, Hobart (2006).

<sup>13</sup> See *Criminal Code Act 1924* (Tas), ss 158 and 56 respectively.

<sup>14</sup> *Criminal Code Act 1924* (Tas), s 389(3). Tasmania is the only jurisdiction in Australia to adopt such an approach. Cf eg *Crimes Act 1900* (NSW) for a range of legislative maxima. Note also that the maximum penalty that can be imposed for offences dealt with in the Tasmanian Magistrates’ Court is two years for a single offence and five years for multiple offences: *Sentencing Act 1997* (Tas), s 13.

<sup>15</sup> Warner, n 10, [1.202]. See also *Lowe v The Queen* (1984) 154 CLR 606, 610-11 and discussion in [5.3.2.2]. Tonry has suggested that there is ‘unfortunately no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities’: Michael Tonry, ‘Sentencing Reform Across National Boundaries’ in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford (1995) 268, 271.

<sup>16</sup> *R v Edirimanasingham* [1961] AC 454, 460 (Lord Tucker). Research for the period 1978-1986 indicates that general sentences were passed in 80% of counts in the Supreme Court: Kate Warner, ‘General Sentences’ (1987) 11 *Criminal Law Journal* 335, 335. There do not appear to have been any more recent data published on this issue. Analysis of data compiled by the Tasmanian Law Reform Institute from TasinLaw’s Supreme Court database indicates that in 2001-2006, 45% of sentences imposed were general sentences.

<sup>17</sup> *DPP (Tas) v Farmer* [2005] TASSC 15, [22] (Evans J).

<sup>18</sup> *Crimes Act 1914* (Cth), s 4K(4). General sentences are said to be especially useful in this context, as they obviate many of the difficulties associated with sentencing offenders convicted of multiple counts, although this will of course still be subject to the principle of totality: see Warner, n 10, [9.216] and Warner, n 16, 342. General sentences are presently only available in respect of summary Federal offences: see *R v Bibaoui* [1997] 2 VR 600 and *Putland v The Queen* (2004) 218 CLR 174, [9]; [116]-[117]. It has recently been suggested, however, that this should be extended to indictable matters: Australian Law Reform Commission, *Same Crime, Same Time*, Report 103, Canberra (2006) (ALRC), [12.24]-[12.46] and Rec 12-3(a).

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imprisonment.<sup>19</sup> Instead, this area is governed by the common law parsimony principles, with Crawford J stating in *Williscroft v Hibble*<sup>20</sup> that a ‘sentence of actual imprisonment should be a sentence of last resort, particularly for a first offender, and one to be imposed only where an alternative punishment is inappropriate’. It has been suggested that the failure to specifically enunciate the principle in legislation may mean that sentencing judges do not have adequate regard to it when imposing sentence<sup>21</sup> and the Tasmania Law Reform Institute (TLRI) is currently in the process of finalising a recommendation suggesting that the principle of restraint in the use of imprisonment be legislatively prescribed.<sup>22</sup>

Unlike some other jurisdictions,<sup>23</sup> the Act does not create a hierarchy of sanctions which the court can impose,<sup>24</sup> even though this would provide guidance as to the relative severity of sentencing options and may help ensure sentences are consistent. Section 7 of the Act sets out the following sanctions available to the court, although it has been held that these are ‘not exhaustive’.<sup>25</sup> Pursuant to section 7, the court may order:

- a term of imprisonment;<sup>26</sup> or
- a drug treatment order if the court is constituted by a magistrate;<sup>27</sup>

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<sup>19</sup> Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008 (TLRI), 6. See also Kate Warner, ‘Sentencing Review 1997’ (1998) 22 *Criminal Law Journal* 282, 287-8; Warner, n 10, [1.204] and Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [12.2.1], who note that s 12(2) provides a limited expression of the principle by stating that where imprisonment is the only punishment for an offence, the court may nevertheless impose a non-custodial sentence if it considers that this will better meet the justice of the case. See discussion in [2.2.2] for the position in other Australian jurisdictions and [3.4.2], (Q11) for sentencers’ responses to the desirability of introducing legislative provisions of this kind in Tasmania.

<sup>20</sup> *Williscroft v Hibble* [2002] TASSC 88, [16]. The principle is also enunciated in current Government policy: see for example Tasmanian Department of Justice and Industrial Relations, Corrective Services Division, *Submission to Legislative Council Select Committee on Correctional Services and Sentencing in Tasmania*, Hobart (1999).

<sup>21</sup> See Roberts, n 2, 124, where it is hypothesised that the codification of the principle of restraint may have played a role in the 10% increase in the use of probation in Canada.

<sup>22</sup> See TLRI, n 19, 7. It was suggested that a ‘statutory statement of restraint in the use of custody does serve as a salutary reminder of principle of parsimony and an encouragement of such of restraint...the principle should be one that argues for the use of non-custodial sentences rather than custodial ones, and shorter custodial sentences rather than longer ones’. See also Sentencing IP, n 10, Discussion Point 1.5.

<sup>23</sup> Eg *Sentencing Act 1991* (Vic), s 5(3)-(7). For discussion, see Richard Fox and Arie Freiberg, ‘Sentencing Structures and Sanction Hierarchies’ (1986) 10 *Criminal Law Journal* 216; Victorian Sentencing Committee, *Sentencing*, Attorney General’s Department, Melbourne (1988), 363-4; Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29, Canberra (2005), [7.18]-[7.25], Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper 70, Canberra (2005), [7.123]-[7.131] and ALRC, n 18, [7.63]-[7.64].

<sup>24</sup> Note however that Edney and Bagaric, n 19, describe s 7 as ‘providing for penalties in descending levels of severity’: [12.2.2].

<sup>25</sup> *Burk v Dunham* [1999] TASSC 35, [2] (Cox CJ). For discussion of ancillary orders, including restitution, compensation and forfeiture, see Warner, n 10, Ch 5 and 6. See also Edney and Bagaric, *ibid*, [13.2.8] for discussion of intermediate sanctions in Tasmania.

<sup>26</sup> See discussion in Warner, *ibid*, [9.1] and TLRI, n 19, 1-16. See also Edney and Bagaric, *ibid*, Ch 12.

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- a term of imprisonment, either wholly or partly suspended;<sup>28</sup> or
- a community service order;<sup>29</sup> or
- a probation order (with or without recording a conviction);<sup>30</sup> or
- an order to pay a fine;<sup>31</sup> or

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<sup>27</sup> Drug treatment orders (DTOs) are governed by Part 3A of the *Sentencing Act 1997*. Pursuant to s 27B(c)(ii), a DTO is not available where the court would otherwise have suspended the sentence in whole or part. See Tasmania, *Parliamentary Debates*, Legislative Assembly, 4 July 2007, Part 2 (Steven Kons, Attorney General). The power was introduced on 20 August 2007 by the *Sentencing Amendment Act 2007* (Tas) for sentences imposed by magistrates although the legislation presently stipulates that no orders can be made after 31 May 2008. Notwithstanding this limitation, the TLRI has suggested that if evaluation of the program 'proves promising', the power to make drug treatment orders should be continued and extended to the Supreme Court: *ibid*, 73. For discussion, see Tasmanian Department of Justice, *The Tasmanian Court Mandated Diversion Program (CMD) - Procedural Manual: A Guide to the Sentencing into Drug Treatment Program, Category 2 Offenders Diverted to Drug and Alcohol Programs as a Condition of a Court Order*, Hobart, July 2007, Tasmanian Department of Justice, *The Tasmanian Court Mandated Diversion Program (CMD) - Procedural Manual: A Guide to the Diversion of Category 1, 2 and 3 Offenders*, Hobart, October 2007 and TLRI, n 19, 72-4. See also discussion in [3.4.3], (Q10) and [5.3.1.5].

<sup>28</sup> See Warner, n 10, [9.2] and TLRI, *ibid*, 17-32.

<sup>29</sup> See Warner, *ibid*, [8.3] and TLRI, *ibid*, 48-54. For further discussion, see George Zdenkowski and Janet Chan, 'Just Alternatives - Part II' (1986) 19 *Australian and New Zealand Journal of Criminology* 131; Christopher Trotter, 'Contamination Theory and Unpaid Community Work' (1995) 28 *Australian and New Zealand Journal of Criminology* 162; Wing Committee, n 5, 181; Martin Killias, Marcelo Aebi and Denis Ribeaud, 'Does Community Service Rehabilitate better than Short-Term Imprisonment?' (2000) 39 *Howard Journal of Criminal Justice* 40; Sue Rex, 'Reinventing Community Penalties: The Role of Communication' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002) 138, 152; Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30, Sydney (2006) (LCSCJ), [4.27]-[4.32] and Jeffrey Bouffard and Lisa Muftic, 'The Effectiveness of Community Service Sentences Compared to Traditional Fines for Low-Level Offenders' (2007) 87 *The Prison Journal* 171.

<sup>30</sup> See Warner, *ibid*, [8.2] and TLRI, *ibid*, 55-61. For further discussion, see Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections*, Government Printer, Adelaide (Mitchell Report) (1973), 37; Stephen Brody, *The Effectiveness of Sentencing*, Home Office Research Study 35, London (1976); Andrew von Hirsch, 'The Ethics of Community Based Sanctions' (1990) 36 *Crime and Delinquency* 162, 169; Doris L MacKenzie et al, 'The Impact of Probation on the Criminal Activities of Offenders' (1999) 36 *Journal of Research in Crime and Delinquency* 423; Chris May and James Wadwell, *Enforcing Community Penalties*, Findings 155, Home Office, London (2001); Rex, *ibid*; Rob White, *Community Corrections Service Tasmania*, Briefing Paper No 1, Criminology Research Unit, School of Sociology and Social Work, University of Tasmania (2003); Simon Merrington, 'Is More Better? The Value and Potential of Intensive Community Supervision' (2006) 53 *Probation Journal* 347 and Cassia Spohn, 'The Deterrent Effect of Imprisonment and Offenders' Stakes in Conformity' (2007) 18(1) *Criminal Justice Policy Review* 31.

<sup>31</sup> See Warner, *ibid*, Ch 4 and TLRI, *ibid*, 62-69. For research on the use of fines, see: Voula Marinos, 'Equivalence and Interchangeability: The Unexamined Complexities of Reforming the Fine' (1997) 39 *Canadian Journal of Criminology* 27; Alan Mackie et al, *Clearing the Debts: The Enforcement of Financial Penalties in the Magistrates' Courts*, Home Office Online Report 09/03, London (2003); Wendy Searle, *Court-imposed Fines: A Survey of Judges*, Ministry of Justice, Wellington (2003); John Raine, Eileen Dunstan and Alan Mackie, 'Financial Penalties: Who Pays, Who Doesn't and Why Not?' (2004) 43 *Howard Journal of Criminal Justice* 518; Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (4th ed, 2005), [10.5]; Rob White and Sandra Perrone, *Crime and Social Control*, Oxford University Press, Melbourne (2nd ed, 2005), 158; ALRC, n 18, [7.3]-[7.18]; R Barry Ruback and Mark Bergstrom, 'Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications' (2006) 33 *Criminal Justice and Behavior* 242; Steve Moffatt and Suzanne Poynton, *The Deterrent Effect of Higher Fines on Crime: Driving Offences*, Crime and Justice Bulletin No 106, NSW Bureau of Crime Statistics and Research, Sydney (2007) and Katherine

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- in the case of a family violence offence, a rehabilitation program order (with or without recording a conviction);<sup>32</sup>
- an order to adjourn the proceedings for up to five years and release the offender (with or without recording a conviction) on the offender giving an undertaking with conditions attached;<sup>33</sup> or
- an order recording a conviction and the discharge of the offender.<sup>34</sup>

There is also no legislatively sanctioned list of relevant factors to be taken into account in sentencing.<sup>35</sup> As Green CJ stated in *Percy*,<sup>36</sup> the exercise of the sentencing discretion ‘always depends on all the circumstances of the case including the particular circumstances of the offence and the offender, together with more general matters such as the incidence of the offence and current social and judicial attitudes to it’. The discussion in this section highlights that the current sentencing regime in Tasmania is underpinned by significant judicial discretion and it is therefore likely that attempts to encroach on that discretion would be met with resistance.

### 1.2.1 Sentencing reviews

In 1999, the Legislative Council Select Committee (the Wing Committee) released a report, *Correctional Services and Sentencing in Tasmania*, which provided a detailed analysis of the state of custodial facilities in Tasmania, compared with elsewhere in Australia and overseas. The Wing Committee was of the view that ‘in keeping with the principles of restorative justice the sentencing process should aim to use imprisonment as a last resort for all but serious crimes and repetitive offenders’.<sup>37</sup> Most of the recommendations contained in the report do not impact directly on the present discussion, but it was recommended, *inter alia*, that any new prison facility provide for the separation of youthful and first offenders from the more experienced

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McFarlane and Patrizia Poletti, *Judicial Perceptions of Fines as a Sentencing Option - A Survey of NSW Magistrates*, Monograph 1, Sentencing Council, Sydney (2007).

<sup>32</sup> These orders became available in from 30 March 2005 as part of the Safe at Home program. Recent figures indicate that in the first two and a half years, 8419 Tasmanian families were dealt with under the program: ‘Government to Review Family Violence Laws’, *ABC News*, Hobart, 13 January 2008, <http://www.abc.net.au/news/stories/2008/01/13/2137365.htm> and Worley, Mark, ‘Kids in Domestic Shock’, *The Mercury* (Hobart), 14 January, 2008, <http://www.news.com.au/mercury/story/0,22884,23048365-3462,00.html>.

<sup>33</sup> See Warner, n 10, [7.4] and TLRI, *ibid*, 70-1.

<sup>34</sup> See Warner, *ibid*, [7.303]-[7.305].

<sup>35</sup> Cf *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A; *Crimes Act 1900* (ACT), s 342; *Sentencing Act 1995* (NT), s 5(2); *Penalties and Sentences Act 1992* (Qld), s 9(2); *Criminal Law (Sentencing) Act 1988* (SA), s 10; *Sentencing Act 1991* (Vic), s 5(2) and *Crimes Act 1914* (Cth), s16A(2). See also ALRC, n 18, Rec 6-1.

<sup>36</sup> *R v Percy* [1975] Tas SR 62, 64. See also Warner, n 10, [3.101] and Laws of Australia, *Criminal Sentencing*, Volume 12, Law Book Company, Sydney, [130-17055]-[130-17150], current as at 1 December 1996.

<sup>37</sup> Wing Committee, n 5, 8. It has been asserted by the Department of Justice that the Tasmanian Government’s focus is on restorative justice: see Department of Justice, n 6.

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prison population.<sup>38</sup> Unfortunately this recommendation was not adopted in the building of the new prison.<sup>39</sup>

In 2001, the TLRI Board considered a request by the Attorney General to undertake a project on sentencing. The Board recommended that the review be undertaken, and in October 2002, the TLRI released an Issues Paper,<sup>40</sup> covering the broad themes of sentencing trends, crime levels, sentencing options, the role of victims and the community and parole. The TLRI received 25 submissions, many of which saw a need for changing the status quo in respect of suspended sentences, although there was less consensus as to what changes should be made. Whereas the Department of Police and Public Safety suggested that suspended sentences had ‘become outdated and should be rescinded’,<sup>41</sup> the then Chief Justice regarded them as serving a useful purpose and considered the present system to be ‘satisfactory’.<sup>42</sup> Such diametrically opposed views are impossible to reconcile. However, this thesis aims to provide research findings to inform the debate about the future of suspended sentences.

Several respondents adverted to the perception among offenders and the public that suspended sentences are a ‘soft’ option<sup>43</sup> and the Department of Justice considered that the use of the term ‘suspended’ itself contributed to this perception, and suggested that some other terminology be adopted.<sup>44</sup> The Department of Justice also suggested that a suspended sentence becomes ‘less effective if imposed without supervision’ and tentatively proposed adopting the English ‘custody minus’ model,<sup>45</sup> as well as recommending consideration of automatic activation on breach.<sup>46</sup> The desirability of imposing more onerous conditions on a suspended sentence was effectively endorsed by the Director of Public Prosecutions (DPP), Tim Ellis SC, who suggested that it be statutorily required that a suspended sentence only be given

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<sup>38</sup> Wing Committee, *ibid*, 68. See [3.4.2], (Q12) for discussion of how exposure to the adverse impact of prison may influence judicial thinking on suspending the sentence.

<sup>39</sup> The Director of Prisons, Graeme Barber, advised Professor Kate Warner by email that although the full recommendations of the Wing Committee report were not implemented, ‘We attempt to accommodate young/vulnerable and first time offenders at Hobart Reception Prison, but we are not always able to do that’: Email from Graeme Barber, Director of Prisons, Tasmania, to Professor Kate Warner, 12 November 2007.

<sup>40</sup> Sentencing IP, n 10.

<sup>41</sup> Department of Police and Public Safety (Submission 5), Tasmania Law Reform Institute (ed), *Responses to the Sentencing Issues Paper No 2*, Hobart (2002) (Sentencing IP Responses).

<sup>42</sup> The Hon Justice Cox, Chief Justice (Submission 3), *ibid*.

<sup>43</sup> Kim Baumeler, Criminal Law Subcommittee of the Law Society (Submission 1); Tim Ellis SC, Director of Public Prosecutions (Submission 6) and Diane Jackson (Submission 14), *ibid*.

<sup>44</sup> For discussion of the judicial officers’ views on this issue, see [3.4.5], (Q15).

<sup>45</sup> Department of Justice and Industrial Relations (Submission 4), Sentencing IP Responses, n 41, 13. On the other hand, the Corrective Services Division of the Department of Justice had previously submitted to the Wing Committee that the use of added conditions heightens the possibility of the person not complying and the remaining term of the sentence therefore having to be served in prison: Department of Justice, n 20. For discussion of the English ‘custody minus’ model, see [2.3.3].

<sup>46</sup> Department of Justice and Industrial Relations (Submission 4), Sentencing IP Responses, *ibid*, 13. Then Chief Justice Cox (Submission 3) shared the concern that if there was no activation on breach, suspended sentences may be seen as ineffectual but as noted above was overall content to maintain the status quo.



in combination with at least one other sentencing option.<sup>47</sup> In the view of John Heathcote, a probation officer, the custom of linking probation with suspended sentences diminishes the impact of probation, which in his view would function better simply as a stand-alone order; nonetheless, he suggested that some involvement with community corrections should be a requirement of all orders.<sup>48</sup> The TLRI is currently in the process of finalising its report, and I have been provided with a confidential draft copy of the relevant part, to which I refer throughout my discussion.

### 1.3 The history of suspended sentences

The principal text on the history of suspended sentences is French jurist Marc Ancel's *Suspended Sentence*.<sup>49</sup> A few key points about the emergence of suspended sentences are taken from his seminal book. Suspended sentences were first used by the ecclesiastical courts in the 14<sup>th</sup> Century. During the 15<sup>th</sup> and 16<sup>th</sup> Centuries, the courts of Zurich applied a similar kind of penalty, allowing the offender to go free, usually subject to conditions, with the threat of more serious punishment in case of relapse, with a similar judicial practice in Hungary during the 16<sup>th</sup> and 17<sup>th</sup> Centuries.<sup>50</sup>

The forerunner to modern suspended sentences was said by Ancel to be conditional release, which 'allowed the delinquent whose offence was not too serious and who had shown good conduct during custody to obtain suspension of part of his sentence'.<sup>51</sup> This sentencing disposition negated the claim of traditional penologists that a sentence needed to be completely executed, as it was suggested that for 'the protection of society, the execution of sentences is less important than their pronouncement in court'.<sup>52</sup> Conditional release also developed the then-new idea that by giving offenders a certain advantage – namely, avoidance of prison – they could be encouraged to rehabilitate themselves.<sup>53</sup>

The suspended sentence in its modern incarnation was first introduced in Belgium in 1888 and in France in 1891 by the *Berenger Act*.<sup>54</sup> A number of countries soon

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<sup>47</sup> See Tim Ellis SC (Submission 6), *ibid*. Edney and Bagaric have recently argued that because suspended sentences do not constitute a recognizable form of punishment, they 'should therefore be abolished as a sentencing option, or substantially reformed so that they incorporate another sanction as part of the suspended sentence – for instance, fine, community work or treatment order – and thus have a practical as opposed to notional effect': Edney and Bagaric, n 19, [13.31].

<sup>48</sup> John Heathcote (Submission 10), *ibid*. See [4.3.4] and [6.4.4] for further discussion of the use of suspended sentences in combination with probation orders.

<sup>49</sup> Ancel, n 3.

<sup>50</sup> *ibid*, 4.

<sup>51</sup> *ibid*, 10.

<sup>52</sup> *ibid*, 8.

<sup>53</sup> *ibid*, 10.

<sup>54</sup> *ibid*, ix. Berenger has been called the Father of the Suspended Sentence, having drawn up the French Bill of 1884, which formed the basis of the Belgian 1888 Act and the French model introduced in 1891: 13.

followed suit<sup>55</sup> and Tasmania was one of the first common law jurisdictions to introduce such sentences. A key aspect underpinning the rationale for suspended sentences was the notion that justice should be individualised,<sup>56</sup> a notion at variance with the rigidity of classical penal law. It was ‘increasingly hoped that judges would be able to adapt the penal sanction to the character of the offender’,<sup>57</sup> with Berenger stating that it was ‘perhaps most important of all, for [the sentence] to be in keeping with the moral state of the person on whom it must fall’.<sup>58</sup> When the suspended sentence was introduced in the French Senate, it was said that the aim was ‘to mitigate the punishment sufficiently to avoid the dangers of imprisonment, while preserving the painful aspect of a penalty, which a simple fine does not generally achieve in our present moral state.’<sup>59</sup> The measure was clearly utilitarian in its aims, as it sought to ‘avoid criminal contagion and the criminal’s return to delinquency’.<sup>60</sup>

The introduction of this new form of sentencing disposition met with considerable resistance from neo-classical jurists, who considered that the whole concept of a penal justice subject to the rule of law would be tainted if a judge were allowed to declare an individual guilty without inflicting punishment or choose not to pronounce a sentence on the accused brought before him by law.<sup>61</sup> Nevertheless, Ancel concluded:

We are in an age in which more and more doubt is being cast on the efficacy, if not even the legitimacy, of imprisonment. It is an age in which methods of treatment in the open are being ceaselessly developed; and in which it is essential that the judge should have a flexible range of sanctions at his disposal...the suspended sentence, both in its old form and in its more differentiated modern forms, is a valid and sound method of non-institutional reaction against crime, based on consideration of the personality of the offender. It is because of this fact that, more than three-quarters of a century after its first appearance in continental law, it still holds a place of prime importance.<sup>62</sup>

It remains to be seen whether this conclusion continues to hold true for Tasmania in the early 21<sup>st</sup> Century.

### 1.4 The case for suspended sentences

In this section, the main arguments in support of suspended sentences and some responses to these arguments are presented. I approach this discussion on the basis of the possible effect of abolishing suspended sentences in a jurisdiction where their use is well-entrenched, as is the case in Tasmania, rather than considering whether such

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<sup>55</sup> *ibid*, 29; 38-40. Ancel lists 14 countries, mainly in Europe, as having introduced suspended sentences by the end of World War I.

<sup>56</sup> See for example the statement by Saleille in 1898 that ‘the adoption of the suspended sentence was the highest degree of individualization’: *ibid*, 12.

<sup>57</sup> *ibid*.

<sup>58</sup> Berenger, French Senate debates, 23 May 1890, excerpted in Ancel, *ibid*.

<sup>59</sup> French Senate debates, 26 May 1884, excerpted in Ancel, *ibid*, 17. The law was ultimately proclaimed on 26 March 1891.

<sup>60</sup> *ibid*, 19.

<sup>61</sup> *ibid*, 22.

<sup>62</sup> *ibid*, 72.

sentences ought to be introduced in a jurisdiction where they have not previously been available. The case against suspended sentences is considered in the next section.

### 1.4.1 Suspended sentences have a symbolic effect

Denunciation of a crime performs an important symbolic function in conveying society's condemnation of the offence<sup>63</sup> and is expressly mentioned as a relevant purpose of sentencing in the Act. The Victorian Sentencing Advisory Council (SAC) recently presented as one of the main arguments for retaining suspended sentences that they

perform an important symbolic function by allowing the seriousness of the offence to be recognised and denunciation of the offender's behaviour to take place through the formal imposition of a term of imprisonment, while allowing the court to deal with the offender in a merciful way.<sup>64</sup>

Similarly, when the New South Wales Law Reform Commission (NSWLRC) recommended the reintroduction of suspended sentences, it considered them to be appropriate in circumstances where other forms of conditional release did not allow for a sufficient element of denunciation of the offence.<sup>65</sup> Shortly after suspended sentences were reintroduced in New South Wales, Wood J controversially imposed a wholly suspended sentence on radio broadcaster John Laws for contempt. In doing so, Wood J observed that the purposes of such sentences are to convey

the seriousness of the offence and the consequences of re-offending to the offender, while also providing him or her with an opportunity to avoid the consequences by displaying good behaviour and by not repeating the relevant breach of the law or any similar breach of the law.<sup>66</sup>

In certain circumstances a suspended sentence may be an appropriate means of expressing denunciation, however, the strength of this argument rests in large part on acceptance of the premise that suspended sentences truly are the second most serious penalty which can be imposed by the courts, and can be fairly compared with an

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<sup>63</sup> Andrew Ashworth, 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems' (Paper presented at the Sentencing: Problems and Prospects Seminar, Australian Institute of Criminology, Canberra, 18-21 March 1986); Victorian Sentencing Committee, n 23, [3.8]; Anthony Doob and Voula Marinos, 'Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishment' (1995) 2 *University of Chicago Law School Roundtable* 413; Sir Guy Green, 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112 and Warner, n 10, [3.213]. It has even been suggested that denunciation 'underlies almost every sentence': Geraldine Mackenzie, *How Judges Sentence*, Federation Press, Sydney (2005), 114.

<sup>64</sup> Sentencing Advisory Council, *Suspended Sentences in Victoria - A Preliminary Information Paper*, Melbourne (2005), 12-13. See also Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties*, Home Office, London (1978), [268]; Keith Soothill, 'The Suspended Sentence for Ex-Prisoners Revisited' [1981] *Criminal Law Review* 821, 827 and Bottoms, n 1, 20.

<sup>65</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79, Sydney (1996) (NSWLRC Report), [4.22]. See also New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, Sydney (1996) (NSWLRC DP), [4.22]

<sup>66</sup> *R v Laws* (2000) 116 A Crim R 70, 79 (Wood J). Cf cases where it has been held that only an immediate custodial sentence will serve to adequately denounce certain types of offending, for example, *R v Sugg* (Unreported, Tas CCA, Neasey, Cosgrove and Brettingham-Moore JJ, 3 June 1985); *R v Whelan* (2004) 42 MVR 541 and *Sumner v Police* [2004] SASC 158.

immediate custodial sentence. This may, however, be something of a legal fiction. As was acknowledged in one submission to the SAC, the ‘denunciatory effect will most often be blunted once someone appreciates that the offender is not actually in custody’.<sup>67</sup> Furthermore, this approach appears to privilege prison as the only means of recognising the seriousness of an offence. For judicial officers at least, suspended sentences may have a denunciatory impact, although as will be discussed further in Chapter 3, judges in Tasmania were more likely than magistrates to see a suspended sentence as serving the purpose of denunciation.

### 1.4.2 Suspended sentences are an effective deterrent

It is widely asserted that suspended sentences are an effective specific deterrent against the further commission of crime.<sup>68</sup> As Tait suggests,

Durkheim recognised the most effective form of social control was not supervision by armed men in uniforms but internal restraint resulting from proper education and socialisation. A threat of punishment is therefore just as ‘real’ as any of the other fears, expectations, obligations and duties which populate the social world. However it depends for its credibility not on physical objects like walls, guns and occasional beatings, but on the consent and compliance of the individual free citizen. To some extent everyone lives under the shadow of imprisonment (if you murder someone you will go to prison); but the threat is more individualised and immediate when a court imposes such a sentence.<sup>69</sup>

The so-called Sword of Damocles is said to carry

a clear warning to the offender which he disregards at his peril. He knows exactly what is likely to happen if he is convicted of a further offence committed during the operational period of the suspended sentence, and he must adjust his behaviour accordingly or face the consequences.<sup>70</sup>

This proposition has a certain intuitive appeal, for as Ashworth has observed, it is ‘surely a commonsense notion’ to suggest that a suspended sentence, ‘with a specific term of imprisonment prescribed in case of breach, is much more likely to impress

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<sup>67</sup> Sentencing Advisory Council, *Suspended Sentences: Interim Report*, Melbourne (2005) (SAC Interim Report), [2.46]. Similarly, when I asked the Tasmanian Director of Public Prosecutions ‘does a suspended sentence denounce?’, he responded with ‘that’s a fiction’, adding that community service orders ‘have a bit more denunciatory value than a wholly suspended sentence’: Meeting between Lorana Bartels, Tim Ellis SC and Professor Kate Warner, Hobart, 15 April 2007 (Meeting with DPP).

<sup>68</sup> Ancel described the ‘vivid memory of the sanction pronounced on his past offence and the feeling of the threat which hangs over him should he return to crime’: Ancel, n 3, 37. See also Alec Samuels, ‘The Suspended Sentence: An Appraisal’ (1974) 138 *Justice of the Peace* 400; Billy Strachan, ‘The Suspended Sentence and Its Application - I’ (1977) 121(41) *Solicitor’s Journal* 669; Soothill, n 64 and J Q Campbell, ‘A Sentencer’s Lament on the Imminent Death of the Suspended Sentence’ [1995] *Criminal Law Review* 293. See also judicial comments in [3.4.1], (Q1).

<sup>69</sup> David Tait, ‘The Invisible Sanction: Suspended Sentences in Victoria 1985-1991’ (1995) 28 *Australian and New Zealand Journal of Criminology* 143, 145.

<sup>70</sup> Andrew Ashworth, *Sentencing and Penal Policy*, Weidenfeld and Nicolson, London (1983), 243. This quote was omitted from subsequent editions of the text. See also Ancel, n 3, 30. Note that partly suspended sentences are considered by some to be a more effective deterrent because it provides the offender with the actual ‘clang of the prison gates’ followed by a ‘short sharp and... nasty taste of prison’: James Dignan, ‘The Sword of Damocles and the Clang of the Prison Gates: Prospects on the Inception of the Partly Suspended Sentence’ (1984) 23(3) *Howard Journal of Criminal Justice* 183, 191.

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some offenders than the vague possibility of a custodial sentence on breach of a conditional discharge, probation order or community service order'.<sup>71</sup> This assumption also acknowledges the 'early lesson of the research literature...that deterrence is a subjective phenomenon; offender perceptions are therefore critical'.<sup>72</sup>

However, this approach treats the offender as a responsible moral agent, fully in control of his or her behaviour.<sup>73</sup> In reality, it is 'arguable that some offences are the product of an overwhelming combination of circumstances which lead a person to react under stress in a criminal way', which is neither wholly within the offender's control or necessarily a signal for a deterrent response.<sup>74</sup> Furthermore, this approach is underpinned by an assumption that the sentencing judge has some sort of knowledge of the offender and the potential effect of a suspended sentence on that individual, whereas in all likelihood,

On the information available to a court when passing sentence it would seldom be possible for the court to assess whether, in a particular case, a suspended sentence of known severity would be likely to be a more powerful deterrent than probation or conditional discharge with its liability to punishment of a degree of severity not then known.<sup>75</sup>

It is also worth noting that suspended sentences are not regarded as being an effective medium for general deterrence,<sup>76</sup> which has recently been described as 'the

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<sup>71</sup> Ashworth, *ibid*, 244. Note this model generally compares suspended sentences with non-custodial orders, not sentences of immediate imprisonment: Bottoms, n 1, 3. Although Bottoms considers that there is nothing illogical about supporting both this theory and the 'avoiding prison' theory simultaneously, he submits that only the latter theory has been endorsed in England: 4.

<sup>72</sup> Roberts, n 2, 55. A recent analysis of deterrence research similarly concluded that 'Because deterrence is concerned with compliance with law in order to avoid punishment, it is a *subjective* matter. Offenders, by definition, can be deterred only if they are aware of penalties and fear them': Andrew von Hirsch et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Hart Publishing, Oxford (1999), 2.

<sup>73</sup> Ancel, for example, stated that the 'man for whom the ordinary suspended sentence was conceived was the "rational man who is the master of himself" in the Declaration of Rights, 1789': Ancel, n 3, 31.

<sup>74</sup> Ashworth, n 70, 243. It is in this context interesting to note the findings of a study of 278 American prisoners who were asked 'When you committed this crime, how likely did you think it was that you would be caught?'. Only 24% thought it very or somewhat likely they would be caught, while 42% 'did not think about it' and 21% thought they would not be caught. When prisoners were asked 'When you committed the crime, did you know what the likely punishment would be if you were caught?', 35% 'didn't think about it', and a further 18% said they either did not know or thought they knew but were wrong. Overall, 76% of all offenders were 'totally incognizant of one or both factors': David Anderson, 'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' (2002) 4 *American Law and Economics Review* 295, 303.

<sup>75</sup> Advisory Council on the Treatment of Offenders, *Suspended Sentence*, Home Office, London (1952), [9].

<sup>76</sup> For background on general deterrence, see Jeremy Bentham, 'Punishment and Deterrence' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Punishment*, Hart Publishing, Oxford (2nd ed, 1998) 53, 53 and Cesare Beccaria, *On Crimes and Punishments and Other Writings*, edited by Richard Bellamy, Cambridge University Press, Cambridge (1995).

For recent research and commentary, see eg Daniel Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-first Century' (1998) 23 *Crime and Justice* 1; Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Punishment*, Hart Publishing, Oxford (2nd ed, 1998), Ch 2; David Moxon, 'The Role of Sentencing Policy' in Peter Goldblatt and Chris

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most frequently invoked justification for penalties in sentencing decisions'.<sup>77</sup> Indeed, the courts appear to be sceptical of the efficacy of suspended sentences in this context, with a number of recent Australian cases suggesting that suspended sentences are incapable of meeting the requirements of general deterrence.<sup>78</sup> In the Tasmanian case of *Percy*, Neasey J considered a suspended sentence to be 'virtually of no value as a deterrent to others who might be disposed to commit similar offences',<sup>79</sup> while Chambers J suggested that:

imprisonment as a deterrent is easily comprehended by the ordinary man, but a suspended sentence is unlikely to produce the same effect. An effective sentence of imprisonment cannot be shrugged off but, certainly in the case of a person who has consistently been in trouble with the law on previous occasions...a suspended sentence might be regarded as something in the nature of a 'paper tiger'.<sup>80</sup>

### 1.4.3 Suspended sentences provide a useful sentencing option

When the availability of suspended sentences in England was restricted to cases involving 'exceptional circumstances', a Stipendiary Magistrate lamented their demise, stating that sentencers had now lost 'a very valuable tool'.<sup>81</sup> Similarly, Freiberg's suggestion in 2001 that suspended sentences be abolished in Victoria was met with resounding opposition from the Attorney-General, who declared that sentencers should have more, not fewer, sentencing options.<sup>82</sup> Although it has since been determined that suspended sentences will be abolished in Victoria,<sup>83</sup> the Magistrates' Court of Victoria argued for the retention of suspended sentences on the basis that 'the removal of suspended sentences or the limiting of their availability for

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Lewis (eds), *Reducing Offending: An Assessment of Research Evidence on Ways of Dealing with Offending Behaviour*, Home Office Research Study 187, London (1998) 85; von Hirsch et al, n 72; Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (3rd ed, 2000); Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, London (2001); Warner, n 10, [3.206]-[3.211]; Anderson, n 74; Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals' (2003) 23 *Criminal Law Journal* 119; Anthony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2004) 30 *Crime and Justice* 143; Don Weatherburn, *Law and Order in Australia: Rhetoric and Reality*, Federation Press, Sydney (2004); Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; ALRC, n 18, [4.6]-[4.11] and Edney and Bagaric, n 19, [3.3].

<sup>77</sup> Kate Warner, 'The Effectiveness of Sentencing Options: What Works?' (Paper presented at the Local Courts of NSW Annual Conference, Sydney, 2 August 2007), 3

<sup>78</sup> See eg *Vartzokas v Zanker* (1989) 51 SASR 277; *R v Wacyk* (1996) 66 SASR 530; *R v Taylor* [2000] NSWCCA 442; *Ryan v The Queen* (2001) 206 CLR 267; *Nicholls v Police* [2003] SASC 303; *R v Lappas* (2003) 152 ACTR 7; *Sumner v Police* [2004] SASC 158 and *R v Dutton* [2005] NSWCCA 248. For further discussion, see [3.4.1], (Q1) and [4.3.6.1].

<sup>79</sup> *R v Percy* [1975] Tas SR 62, 74.

<sup>80</sup> *ibid.*, 82. See also *R v Causby* [1984] Tas R 54, 62 (Neasey J), 67 (Cox J).

<sup>81</sup> Campbell, n 68, 294.

<sup>82</sup> 'Sentencing in the Dock', *Lawyers Weekly*, 24 August 2001, 1. See also NSWLRC DP, n 65, [4.22] and NSWLRC Report, n 65, Rec 33.

<sup>83</sup> See discussion in [1.5.2.1].

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imposition would remove an important arrow from the quiver of sentencing dispositions available to the Court'.<sup>84</sup>

On the other hand, there may also be difficulties with creating too many sentencing options. Although Ashworth suggests that 'courts are likely to use imprisonment less frequently if they have a wide range of non-custodial alternatives than if they have only a few non-custodial measures to choose from',<sup>85</sup> greater choice of sentence may also be 'a source of confusion, not least because of the inherent difficulties of understanding the relative leniency or harshness of different disposals in relation to one another'.<sup>86</sup> The English Advisory Council on the Treatment of Offenders opposed the introduction of suspended sentences, warning that 'to justify any new form of penal treatment there must be strong reasons to show that the suggested innovation would be likely to be a positive improvement on existing methods'.<sup>87</sup>

Suspended sentences have been continually in use in Tasmania for over 80 years and there are fewer 'alternative'<sup>88</sup> sentencing options available than in most Australian jurisdictions. In particular, home and periodic detention and intensive correction orders are not currently available, although their introduction is being considered.<sup>89</sup> There are also currently limited options targeting offenders with substance abuse issues in Tasmania, although drug treatment orders have recently been introduced in the Magistrates' Court.<sup>90</sup> I would therefore suggest that there is some force to the argument that suspended sentences provide a useful sentencing option in a jurisdiction like Tasmania where there are limited sentencing options.

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<sup>84</sup> SAC Interim Report, n 67, [2.4].

<sup>85</sup> Ashworth, n 70, 437. This quote does not appear to have been reproduced in subsequent editions. Note however the argument that it is flawed to place sentencing dispositions along a continuum, because punishments serve a variety of functions: Doob and Marinos, n 63, 414. See also Voula Marinos, 'Thinking about Penal Equivalents' (2005) 7 *Punishment and Society* 441.

<sup>86</sup> Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing*, Centre for Socio-Legal Studies, Oxford (1987), 6.

<sup>87</sup> Advisory Council on the Treatment of Offenders, n 75, [9].

<sup>88</sup> In using this term, I acknowledge the view that it is 'a mistake to take imprisonment as the *paradigm* of punishment, if this means regarding it either as the most *usual* mode of punishment, or as the presumptively appropriate punishment for most offences, so that non-custodial punishments must be justified as "alternatives"': Anthony Duff et al (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice*, Manchester University Press, Manchester (1994), 8. Emphasis in original. See also Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience*, Federation Press, Sydney (1999), 107.

<sup>89</sup> Sentencing IP, n 10, Discussion Points [1.10]-[1.13]. In its draft report, the TLRI has proposed introducing 'front-end' home detention which should not be a condition of a suspended sentence but a custodial sentence located in the sentencing hierarchy between an immediate sentence of imprisonment and a wholly suspended sentence of imprisonment': see TLRI, n 19, 40. The introduction of periodic detention and intensive corrections orders is not recommended: 44. For discussion of these options, see 33-44. Note that New South Wales, which is the only State with periodic detention, is considering abolishing such orders and replacing them with a community corrections order: 'New plan to "scrap periodic detention"', *Sydney Morning Herald* (Sydney), 7 January 2008, <http://news.smh.com.au/new-plan-to-scrap-periodic-detention/20080107-1khq.html>. See also NSW Sentencing Council, *Review of Periodic Detention*, Sydney (2007).

<sup>90</sup> See discussion at [1.2]. For further discussion of the use of suspended sentences for offenders with substance abuse problems, see [3.4.3], (Q10) and [5.3.1.5].

#### 1.4.4 Suspended sentences enable offenders to avoid short prison sentences

One of the classic arguments for suspended sentences is the so-called ‘avoiding prison’ theory, which posits that suspended sentences enable offenders to avoid exposure to prison, especially for short terms of imprisonment, thereby ensuring that they are not exposed to the notoriously corrupting influences of prison.<sup>91</sup> This view underpinned the decision to introduce suspended sentences in England, with the then Home Secretary suggesting it to be a ‘great mistake to acclimatise people to prison whenever it is unnecessary to do so’, which ‘get[s] them used to prison and to accepting prison as a feature of their lives’, as well as ‘fritter[ing] away the deterrent effect of prison, thereby doing harm to the individual and to society.’<sup>92</sup>

Keeping offenders out of prison is also expected to have a protective effect against re-offending, by maintaining offenders’ links with their community, as well as minimising the disruption to offenders’ families, accommodation and employment. Recent research has found that even a short period of custody may lead to loss of accommodation.<sup>93</sup> The deleterious impacts of prison are seen as particularly acute in respect of short prison sentences and offenders who serve sentences of 12 months or

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<sup>91</sup> The fact that prison is not very effective at rehabilitating offenders appears to be generally accepted. Already in the 1930s, an English Prison Commissioner, Alexander Paterson, declared that ‘it is impossible to train men for freedom in a condition of captivity’, cited in Ashworth, n 31, [9.3.1]. For further discussion of the detrimental effects of prison, see: Law Reform Commission of Canada, *Our Criminal Law*, Ottawa (1977), 24; Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, Panel on Research on Deterrent and Incapacitative Effects, National Academy of Sciences, Washington, DC (1978), 22; Australian Law Reform Commission, *Sentencing*, Report 44, Canberra (1988), 24; Andrew Ashworth, *Custody Reconsidered: Clarity and Consistency in Sentencing*, Home Office, London (1989); John Braithwaite, *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge (1989), 179; United Kingdom, *Crime, Justice and Protecting the Public*, White Paper (Cm 965), HMSO, London (1990) (*Crime, Justice and Protecting the Public*), [2.8]; Moxon, n 76, 98; Carlos Carcach and Anna Grant, *Imprisonment in Australia: Trends in Prison Population & Imprisonment Rates 1982-1998*, Trends and Issues in Crime and Criminal Justice, No 130, Australian Institute of Criminology, Canberra (1999), 1; Justice Geoffrey Davies and K M Raymond, ‘Do Current Sentencing Practices Work?’ (2000) 24 *Criminal Law Journal* 236, 238; Julian Roberts, ‘Discovering the Sphinx: Conditional Sentencing after the Supreme Court Judgment in *R v Proulx*’ (Paper presented at the Changing Face of Conditional Sentencing Symposium, Ottawa, 27 May 2000), 49; David Tait, *The Effectiveness of Criminal Sanctions: A Natural Experiment*, Report to the Criminology Research Council, 33:96-7, Canberra (2001), 28; Mirko Bagaric, *Punishment and Sentencing: A Rational Approach*, Cavendish, Sydney (2001), 142; Arie Freiberg, *Sentencing Review: Discussion Paper*, Department of Justice, Melbourne (2001) (Freiberg DP), 4; Marc Mauer and Meda Chesney-Lind (eds), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, New Press, New York (2002); Terry Rawnsley, *Dynamics in Repeat Imprisonment: Utilising Prison Census Data*, Australian Bureau of Statistics (2003), 2; Roberts, n 2, 1; 13; Ros Burnett and Shadd Maruna, ‘So ‘Prison Works’, Does It?’ (2004) 43 *Howard Journal of Criminal Justice* 390; Sentencing Council, *Abolishing Prison Sentences of Six Months or Less: Discussion Paper*, Sydney (2004), 9-10 and Borzycki, n 6, 37. For discussion of how this factor influences sentencers’ decision-making, see [3.4.2], (Q12).

<sup>92</sup> Dignan, n 70, 189. See also Ancel, n 3, 11 and Terence Morris, *Deviance and Control: The Secular Heresy*, Hutchinson, London (1976), 136.

<sup>93</sup> See eg Eileen Baldry et al, *Ex-prisoners and Accommodation: What Bearing Do Different Forms of Housing Have on Social Integration?*, Final Report, Australian Housing and Urban Research Institute, Melbourne (2003); Roberts, n 2, 54; Borzycki, n 6, 38-40 and Sentencing Advisory Council, *Suspended Sentences: Discussion Paper*, Melbourne (2005) (SAC DP), 13.



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less may have a higher rate of reconviction.<sup>94</sup> Short-term prisoners may also have greater difficulties accessing rehabilitative programs while in custody and are less likely to be subject to post-release supervision by way of parole,<sup>95</sup> which may further increase their chances of re-offending.

Short prison sentences also significantly increase the prison population,<sup>96</sup> potentially leading to prison overcrowding. They are also costly and pose organisational problems for corrections staff.<sup>97</sup> Research indicates that if all sentences of six months or less in NSW were replaced with non-custodial penalties, there would be savings of \$33-\$47 million in recurrent costs.<sup>98</sup> On this basis, suspended sentences may be regarded as a cost-effective disposition. At the time of sentencing, in the absence of additional supervision by a probation officer, the offender need not cost the State another cent while 'serving' his or her sentence. On the other hand, should the offender breach the suspended sentence and be committed to prison,<sup>99</sup> the costs to the State rise significantly, possibly far beyond what would have been incurred had the offender received a true non-custodial order in the first place. Furthermore, if diligent prosecution of breaches is accompanied by the inappropriate use of suspended

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<sup>94</sup> National Association for the Care and Resettlement of Offenders, *The Forgotten Majority: The Resettlement of Short Term Prisoners*, London (2000), cited in SAC Interim Report, n 67, fn 83. See also Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison*, Prison Reform Trust, London (2003) and discussion in [6.4.3.6].

<sup>95</sup> Note however the draft recommendation by the TLRI that 'post release interventions be made available for short term prisoners in appropriate cases particularly for prisoners with partly suspended sentences with supervision': TLRI, n 19, 10. For a summary of the custodial programs available in Tasmanian prisons, see Kevin Howells et al, *Correctional Offender Rehabilitation Programs: The National Picture in Australia*, Report for Criminology Research Council, University of South Australia, Adelaide (2004), 102-4. See also Maria Borzycki and Eileen Baldry, *Promoting Integration: The Provision of Prisoner Post-release Services*, Trends and Issues in Crime and Criminal Justice, No 262, Australian Institute of Criminology, Canberra (2003); Borzycki, n 6, 53; SAC Interim Report, *ibid*, [2.37] and LCSCJ, n 29, [2.70].

<sup>96</sup> Kate Warner, 'Sentencing Review 2002-2003' (2003) 27 *Criminal Law Journal* 325; Sentencing Council, n 91, 10-11; Roberts, n 2, 29 and ALRC, n 18, [7.67]. Cf the position that short prison sentences are a necessary part of the sentencing continuum: Arie Freiberg, *Pathways to Justice: Sentencing Review*, Department of Justice, Melbourne (2002), 136.

<sup>97</sup> Alison Liebling, 'The Uses of Imprisonment' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002) 105, 126. Note that the same admission process must be undertaken for each offender, whether they are admitted for a week or several years.

<sup>98</sup> Bronwyn Lind and Simon Eyland, *The Impact of Abolishing Short Prison Sentences*, Crime and Justice Bulletin No 73, NSW Bureau of Crime Statistics and Research, Sydney (2002). See also Sentencing Council, n 91 and TLRI, n 19, 3-6. Sentences of three months or less were abolished in Western Australia in 1995 and in 2004, this was extended to sentences of up to six months. Note however the suggestion that 'attempts to compare the cost-effectiveness of imprisonment and community-based options, or the often starkly dissimilar types of offenders serving them, is [sic] misguided': John Tomaino and Andreas Kapardis, 'Sentencing Theory' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice*, Australian Humanities Press, Unley (2004) 80, 99. The authors suggest that community based options are often not as cheap as they appear because the capital costs of prison are present whether the prisons are full or empty.

<sup>99</sup> For discussion of breaches, see Chapter 7.

sentences, this may in fact expose additional offenders to its dangers, thereby contradicting any supposed efficiency gains in reducing admissions to prison.<sup>100</sup>

### 1.4.5 The use of suspended sentences may reduce the prison population

As a corollary of the previous argument, it has been suggested that the availability of suspended sentences may reduce the size of the prison population. Tait has described the prison population as 'the bottom line',<sup>101</sup> while Freiberg and Ross consider it the 'ultimate measure of the impact of suspended sentences'.<sup>102</sup> On the other hand, Bagaric argues that 'the effect on the prison population is not a weighty, far less the sole, consideration by which the success of a criminal sanction may be assessed'.<sup>103</sup> Ashworth has also suggested that the 'level of sentencing ought to be determined on wider social and philosophical arguments rather than upon what buildings are available'.<sup>104</sup>

Although the size of the prison population should again not be the sole consideration for sentencing policy – after all, abolishing prison sentences altogether would obviously reduce prison numbers, but would be politically, socially and legally unacceptable – it is indeed a valid consideration. The use of suspended sentences is however only a minor factor impacting on this issue. Some of the main factors said to affect the size of the prison population include law enforcement practices, legislative amendments, prison sentence lengths, crime rates, changes in offence seriousness, the offending background of offenders and parole practices.<sup>105</sup> While some of these issues may themselves influence the use of suspended sentences,<sup>106</sup> the availability and use of suspended sentences has little or no impact on these issues themselves, and it is the interplay of all these factors which determines the final prison population. It is also important to remember that it is 'the *ultimate* impact on the prison population of the whole effect of a suspended sentence, not just the apparent immediate impact, which really matters for penal analysts'.<sup>107</sup> The impacts

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<sup>100</sup> For discussion of the phenomenon of net-widening, see [1.5.4]. For Tasmanian data on its possible incidence, see [4.3.2.1], [4.3.6.2] and [5.3.6]. Note that Dignan has suggested that 'the connection between administrative convenience and the basic penal philosophy underlying the new formulation of the 'avoiding prison theory' is decidedly more tenuous' than the arguments for suspended sentences on the basis of humanitarianism or fear of contamination: see Dignan, n 70, 190.

<sup>101</sup> Tait, n 69, 158.

<sup>102</sup> Freiberg and Ross, n 88, 126. See also Tait, *ibid*, 158.

<sup>103</sup> Bagaric, n 3, 543.

<sup>104</sup> Ashworth, n 75, 41.

<sup>105</sup> Freiberg DP, n 91, 34. Other factors may include community tolerance of crime, changes in attitudes on the part of police, prosecutors, judges and jurors and a rise in economic and social dislocation: 30.

<sup>106</sup> For example the use of suspended sentences fell for certain offence types following the introduction of standard non-parole periods in NSW, but rose for drink-driving offences following a guideline judgment on this issue: Patrizia Poletti and Sumitra Vignaendra, *Trends in the Use of Section 12 Suspended Sentences*, Sentencing Trends and Issues, No 34, Judicial Commission of New South Wales, Sydney (2005), 9.

<sup>107</sup> Anthony Bottoms, 'The Advisory Council and the Suspended Sentence' [1979] *Criminal Law Review* 437, 439.

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of net-widening, sentence inflation, length of sentence and operational period and possibly increased penalties for subsequent offending,<sup>108</sup> as well as policies for activation on breach are not always readily visible but will dramatically affect this issue.

*Table 1-2: Prison rates and use of suspended sentences by jurisdiction*

<b>Jurisdiction</b>	<b>Prisoners per 100,000, 2005-2006<sup>109</sup></b>	<b>Suspended sentences – higher courts (%), 2005-2006<sup>110</sup></b>
Australian Capital Territory	86	39
Victoria	100	24
South Australia	130	44
Tasmania	138	29
Queensland	179	21
New South Wales	186	17
Western Australia	227	18
Northern Territory	542	19

Table 1-2 sets out the number of prisoners in each Australian jurisdiction per 100,000 in descending order and the proportionate use of suspended sentences in the higher courts. This demonstrates an apparent correlation between high use of suspended sentence and a low imprisonment rate, with the four jurisdictions with the lowest rate of imprisonment also reporting the highest use of suspended sentences, and vice versa.<sup>111</sup> However, this result does not account for factors such as the use of alternative sentencing options, such as periodic detention or intensive supervision orders, nor the myriad other factors that influence the size of the prison population. These figures also do not take into account differences in maximum terms of sentence and operational period or breach provisions, which are discussed further in Chapter 2,<sup>112</sup> and consequently cannot be relied upon as strong evidence that use of suspended sentences corresponds with a reduced prison population.<sup>113</sup>

Arguably, jurisdictions which maintain data before and after the use of suspended sentences should provide a clearer answer to the role played by such sentences in reducing the use of immediate imprisonment and/or the size of the prison population. The inter-jurisdictional research on this issue is however not very compelling. New South Wales reintroduced suspended sentences in 2000 and subsequently saw an increase in the proportionate use of imprisonment in the higher courts, while it remained constant for the Local Courts.<sup>114</sup> Victoria, by contrast, experienced a

<sup>108</sup> See [4.3.6.2] for discussion.

<sup>109</sup> Australian Bureau of Statistics, *Prisoners in Australia*, Cat No 4517.0, Canberra (2006), Table 4.

<sup>110</sup> Australian Bureau of Statistics, *Criminal Courts Australia 2005-06*, Cat No 4513.0, Canberra (2007), Supplementary Datacube 11.

<sup>111</sup> Fisher's exact test suggests this is unlikely to be due to chance ( $p < 0.05$ ).

<sup>112</sup> See discussion in [2.2.3] and [2.2.5] respectively.

<sup>113</sup> In addition, rules for counting prisoners and tracking them through the criminal justice system differ in each Australian jurisdiction: Borzycki, n 6, 6.

<sup>114</sup> The use of suspended sentences in NSW increased from 3% to 5% in the Magistrates' Court and 12% to 17% in the higher courts between 2001 and 2006. The use of imprisonment remained constant,

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decrease in prison population following the introduction of suspended sentences,<sup>115</sup> which led Tait to conclude that:

they are still something of a mystery. Suspended sentences threaten future pain to ensure present compliance. They depend for their success on the avoidance of certain behaviours rather than the performance of activities. They appear to be inconsistent with other forms of penalty which extract money, work or reporting behaviour or loss of liberty. In a system which prides itself on proportionality and consistency, it is hard to make a case for an invisible, intangible, but frequently irresistible sanction. Except that it works.<sup>116</sup>

Tait appears to have derived his belief that the suspended sentence ‘works’ largely from their apparently beneficial effect on the prison population.<sup>117</sup> He conceded that this would be minimised or even nullified in the event of extending the maximum operational period or reducing the court’s discretion on breach, both of which occurred in 1997.<sup>118</sup> Data analysed by the SAC indicate that in 1981, before the introduction of suspended sentences, ‘53 per cent of defendants convicted in the higher courts were sentenced to imprisonment. Following the reintroduction of suspended sentences, imprisonment rates fell to a low of 43 per cent in 1997, and then returned to 53 per cent in 2004’.<sup>119</sup> It therefore seems that the beneficial impact of suspended sentences on the Victorian prison population was only temporary and strongly influenced by provisions as to the length of the operational period and judicial discretion on breach.<sup>120</sup>

Research in New Zealand suggested that ‘there may be little or no benefit from suspended sentences in terms of reducing the number of prison inmates, and that it is possible that the use of this sentence may in fact cause an increase in the number of prison inmates’.<sup>121</sup> Spier concluded that:

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at 7% and 67% respectively: NSW Bureau of Crime Statistics and Research, *New South Wales Court Statistics*, Sydney (2006). For these and earlier data, see [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_court\\_stats](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats). See also Georgia Brignell and Patrizia Poletti, *Suspended Sentences in New South Wales*, Sentencing Trends and Issues, No 29, Judicial Commission of New South Wales, Sydney (2003) and Jason Keane, Patrizia Poletti and Hugh Donnelly, *Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*, Sentencing Trends and Issues, No 30, Judicial Commission of New South Wales, Sydney (2004). Brignell and Poletti were ‘unable to conclude that but for suspended sentences the rate of imprisonment would be even higher than it is. On the other hand, the relatively small use of the suspended sentence penalty may suggest there is scope for increasing its use, and perhaps then a noticeable impact on imprisonment may be discerned’: 16.

<sup>115</sup> The introduction of suspended sentences in Victoria corresponded with a reduction of 340 prison places: Tait, n 69, 143. See also Freiberg and Ross, n 88.

<sup>116</sup> Tait, *ibid*, 159.

<sup>117</sup> For a discussion of how suspended sentences ‘work’ in terms of reconviction, see [6.4.3.1].

<sup>118</sup> See *Sentencing and Other Acts (Amendment) Act 1997* (Vic).

<sup>119</sup> SAC DP, n 93, [5.6].

<sup>120</sup> For further discussion of the different provisions in Australia, see [2.2.3] and [2.2.5]. For discussion of judicial views on breach, see [3.4.6], (Q16). For Tasmanian data on operational periods, see [4.3.3] and [7.5.4.6].

<sup>121</sup> Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996*, Ministry of Justice, Wellington (1997), [7.1]. Spier had earlier found that ‘it appears that the net effect may be a recovery, or even an increase, in the level of the New Zealand prison muster’: Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1985 to 1994*, Ministry of Justice, Wellington (1995).

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The net effect of a large number of suspended sentences being imposed, of which only a minority replace actual prison sentences, together with a relatively high activation rate, is that the number of receptions due to activated suspended sentences may be similar to, if not higher than, the estimated drop in receptions due to the imposition of suspended sentences in the first place.<sup>122</sup>

These findings were influential in the decision to abolish suspended sentences in 2002. Somewhat ironically, there was then a further increase in prison population, and it was suggested that it was 'likely that the abolition of suspended sentences contributed to the higher number of prison sentences imposed in 2003'.<sup>123</sup>

The English data on this issue are inconclusive: although some research indicated that the introduction of suspended sentences in 1967 reduced the prison population,<sup>124</sup> other reports indicated the opposite. Sparks suggested that 'a measure which was intended (*inter alia*) to reduce the prison population has resulted in an increase in that population'<sup>125</sup> and that the overall effect 'could well be to increase the prison population by as much as 25-30 per cent'.<sup>126</sup> The English Advisory Council on the Penal System also concluded that the accumulated evidence was 'not very encouraging. If the main object of the suspended sentence was to reduce the prison population, there are considerable doubts as to whether it has achieved this effect. It may even have *increased* the size of the prison population'.<sup>127</sup> Bottoms in turn considered that the Advisory Council's 'analysis of suspended sentences lacks depth and coherence'<sup>128</sup> and purported to resolve the issue by stating that for 'technical reasons the true effect cannot be precisely calculated, but even if we take the most optimistic view, it is still clear that the Act had not had the reductive effect on prison population which had been intended'.<sup>129</sup>

The position is complicated further by the fact that in 1991, suspended sentences were restricted to cases involving 'exceptional circumstances'. It was expected that the result of the effective disappearance of suspended sentences would be 'enormous',<sup>130</sup> as courts would be required to impose many more unsuspended

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See also Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003*, Ministry of Justice, Wellington (2004), Table 4.9.

<sup>122</sup> Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1989 to 1997*, Ministry of Justice, Wellington (1998), [8.1]. References omitted. It was estimated that the overall effect of suspended sentences on the daily prison population was an increase of approximately 100 to 330 inmates: [8.6].

<sup>123</sup> Spier and Lash, n 121, [4.2].

<sup>124</sup> Ella Oatham and Frances Simon, 'Are Suspended Sentences Working?' (1972) 21 *New Society* 233, who suggested there had been a decrease of between 850 and 1,900 prison places: 235.

<sup>125</sup> Richard Sparks, 'The Use of Suspended Sentences' [1971] *Criminal Law Review* 384, 385. See also Advisory Council on the Penal System, n 76, [265].

<sup>126</sup> Sparks, *ibid*, 393.

<sup>127</sup> Advisory Council on the Penal System, n 76, [265].

<sup>128</sup> Bottoms, n 107, 440.

<sup>129</sup> Bottoms, n 1, 8. See also Ashworth, n 70, 248 and Roger Tarling, 'Sentencing Practice in Magistrates' Courts Revisited' (2006) 45 *Howard Journal of Criminal Justice* 29, 30.

<sup>130</sup> David Thomas, 'Commentary' [1993] *Criminal Law Review* 224, 226. See also Ian McLean, Peter Morrish and John Greenhill, *Magistrates' Court Index*, Oxford University Press, Oxford (13th ed, 2003); Ashworth, n 76; Nigel Walker, *Aggravation, Mitigation and Mercy in Criminal Justice* (1999);

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sentences.<sup>131</sup> However it is not clear that this did occur, even though the use of suspended sentences in the higher courts declined from 30% to 1%.

Between 1991 and 1996, the daily average male prison increased by more than 22%, from 28,551 to 34,856.<sup>132</sup> This led Thomas to conclude that 'there can be little doubt' that restricting the availability of suspended sentences 'has been a major factor in the rise in the prison population'. He went on to say that although 'there are undoubtedly other factors in the equation, there appears to be a strong case for arguing that the repeal of [the restriction] might be a significant step in the direction of controlling the growth of the prison population'.<sup>133</sup> However, Thomas does not appear to have sufficiently acknowledged that the effect on the number of men admitted to prison was in fact minimal: 66,801 adult men were sentenced to prison in 1991, compared with 67,381 in 1996, an increase of only 580, or less than 1%.

Thomas appears to have confused prison 'stock', the number of offenders in custody at a given time, with prison 'flow', that is, the number of offenders sentenced to custody. Thomas' stock figures on the daily prison population are in fact more likely to be a reflection of other factors, such as the length of sentences imposed or the abolition or reduction of parole or remissions.<sup>134</sup> Indeed, one study found that 'most of those previously receiving a suspended sentence [now] seem to be receiving community sentences',<sup>135</sup> suggesting that restricting the availability of suspended sentences to cases where there are exceptional circumstances did not in fact play a significant role in increasing the size of the prison population.

There is also conflicting evidence about the effect of conditional sentences of imprisonment, which are similar in many key respects to suspended sentences, on Canada's prison population. Roberts initially reported the imprisonment rate as essentially remaining stable following the introduction of conditional sentences,<sup>136</sup>

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Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the mid-1990s*, Research Study 180, Home Office, London (1998); Martin Wasik, 'The Suspended Sentence: "Exceptional Circumstances"' (1998) 162 *Justice of the Peace* 176; Campbell, n 68; Nigel Stone, 'The Suspended Sentence since the *Criminal Justice Act 1991*' [1994] *Criminal Law Review* 399 and David Foot, 'The Use of Suspended Sentences' (1993) 157 *Justice of the Peace* 565.

<sup>131</sup> Flood-Page and Mackie suggested that offenders whose cases 'would have attracted a suspended sentence have...moved to immediate custody': Flood-Page and Mackie, *ibid*, 125. Ashworth similarly suggested that '[s]ome courts *may well* have gone on to impose immediate custody because of the restrictions of the power to suspend, rather than moving to a community sentence': Ashworth, *ibid*, 298.

<sup>132</sup> David Thomas, 'Commentary' [1998] *Criminal Law Review* 515.

<sup>133</sup> *ibid*, 516.

<sup>134</sup> For discussion of prison stock and flow, see Lind and Eyland, n 111 and Hough, Jacobson and Millie, n 94, 13.

<sup>135</sup> Sue Rex, 'Applying Desert Principles to Community Sentences: Lessons from Two Criminal Justice Acts' [1998] *Criminal Law Review* 381, 388.

<sup>136</sup> Julian Roberts, 'Reforming Sentencing and Parole in Canada' in Michael Tonry (ed), *Penal Reform in Overcrowded Times*, Oxford University Press, New York (2001) 227, 229. See also Allan Manson, 'The Conditional Sentence: A Canadian Approach to Sentencing Reform or, Doing the Time-Warp, Again' (Paper presented at the Changing Face of Conditional Sentencing Symposium, Ottawa, 27 May 2000), 8 and Kent Roach, 'Conditional Sentences, Restorative Justice, Net-Widening and Aboriginal

but has elsewhere suggested that between 1993-1994, before the introduction of conditional sentences, and 2000-2001, rates of admission to custody dropped by 13%.<sup>137</sup> The latter figures led Roberts to conclude that the experience there has been a positive one, ‘at least in terms of reducing the number of admissions to custody’.<sup>138</sup>

It follows from the foregoing discussion that the ability of suspended sentences to reduce the prison population cannot be easily disentangled from policies affecting its use and other sentencing policies. It is also difficult to place too much reliance on comparative research which makes claims about reductions in prison numbers due to the opacity of the information available.<sup>139</sup> Overall, it cannot be said with confidence that suspended sentences achieve much in terms of reducing the prison population. As Freiberg has pointed out, ‘[w]e should not give up on attempts to change the mix of sanctions and to try to influence the Courts, but realistically, alternatives to imprisonment will only remove a very small proportion of the prison population’.<sup>140</sup>

### 1.5 The case against suspended sentences

#### 1.5.1 A suspended sentence is not real punishment

Under the original system of suspended sentences, one could not add any additional conditions, other than that the offender not commit any further offences during the operational period.<sup>141</sup> This has been modified significantly in a number of jurisdictions,<sup>142</sup> but the basic premise that the offender is able to walk free from the courtroom after their sentence is imposed has led the SAC to conclude that those who claim suspended sentences are not really custodial in nature are justified in their critique.<sup>143</sup> Bagaric also suggests that ‘there is good reason for offenders’ enthusiasm

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Offenders' (Paper presented at the Changing Face of Conditional Sentencing Symposium, Ottawa, 27 May 2000), 26. For discussion of conditional sentences in Canada generally, see [2.5].

<sup>137</sup> Roberts, n 2, 123; Table 6.1.

<sup>138</sup> *ibid*, Foreword by Andrew Ashworth, xi. See also Canadian Centre for Justice Statistics, *Highlights of the Conditional Sentencing Special Study*, Bulletin, Minister of Industry, Ontario, (2002) and Julian Roberts, 'Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales' (2003) 42 *Howard Journal of Criminal Justice* 229, 233.

<sup>139</sup> For example, Tait, n 69, claims that the introduction of suspended sentences in Victoria resulted in a reduction of 340 prison places. He cites the imprisonment rate per 100,000 of population and reports Victoria's prison population as having risen ‘dramatically’ and being at an ‘acute level’, but fails to mention the total prison population in Victoria at the time. Other research indicates the prison population of Victoria at the time is likely to have been in the order of 2,250: see Freiberg and Ross, n 88, 194. Similar issues arise in respect of the English data on prison population, so that it is difficult to obtain a clear picture of the effect of suspended sentences on the prison population.

<sup>140</sup> Arie Freiberg, 'The Politics of Sentencing and Imprisonment' (Paper presented at the Beyond Imprisonment Conference, Hobart, 21 September 2000), 27.

<sup>141</sup> Ansel, n 3, 34.

<sup>142</sup> See discussion in [2.2.4], [2.3.3] and [2.5.2].

<sup>143</sup> SAC Interim Report, n 67, [2.42]. It is in this context interesting to note the recent suggestion that ‘after sentence, all defendants who are found guilty should leave the dock by the same exit i.e. not through the front door’. It was therefore recommended that ‘Offenders receiving community sentences should be “sent down” in the same way as those receiving custodial sentences to reinforce the message that they have not been acquitted’: *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison*, Esmeé Fairbairn Foundation, London (2004) (*Crime, Courts & Confidence*), 59-60.

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towards suspended sentences: they do not constitute a recognisable form of punishment at all'.<sup>144</sup> He argues that:

despite continuing unresolved issues about the nature of punishment, one settled feature is that punishment involves an unpleasantness imposed on the offender. This incontrovertible and seemingly innocuous truth is fatal to the continuation of the suspended sentence as a sentencing option.<sup>145</sup>

In Bagaric's analysis, the imposition of the term of imprisonment cannot be said to constitute 'a form of unpleasantness since by the very nature of the sanction it is suspended precisely in order to avoid its effective operation'. He further submits that the fact that a period of imprisonment *may* ensue is also not tantamount to punishment, even though 'a real unpleasantness is imposed since the people undergoing it face the *risk* of activation in the event of a breach' because

the natural and pervasive operation of the criminal law casts a permanent Sword of Damocles over all our heads: each action we perform is subject to the criminal law. Despite this it has never been seriously asserted that we are all undergoing some type of criminal punishment. It follows logically that the risk of imprisonment in the event of a future commission of a criminal offence is not a criminal sanction; it is a nullity in terms of punitive effect.<sup>146</sup>

Bagaric's line of reasoning has been criticised as 'simplistic', due to its failure to recognise as 'punishment' that the offender has been prosecuted, convicted and has faced the sentencing process with the real threat of going to prison, as well as the stigma attached to a sentence on his or her record which is regarded as equivalent to a sentence of imprisonment.<sup>147</sup> As noted by Tait, a threat of punishment which depends merely on internal restraint is no less 'real' as a consequence.<sup>148</sup> These arguments are also clearly inapplicable to partly suspended sentences or conditional suspended sentences. Furthermore, in the event of breach, the offender also faces a real risk of going to prison for the original offence,<sup>149</sup> as well as potentially having the penalty for the new offence increased as a result of the failure to respond positively to the suspended sentence.<sup>150</sup> Others therefore argue that the Damocles sword image is not to be taken lightly, with Roberts observing that:

Damocles was a courtier forced to remain motionless while sitting under a sharp sword that was hanging by a horsehair. One careless movement would result in rather

<sup>144</sup> Bagaric, n 3, 536 and Edney and Bagaric, n 19, [13.3.1].

<sup>145</sup> *ibid*, 547. Note that these arguments of course do not apply in respect of partly suspended sentences: although the portion of the sentence to be served immediately may be shorter, there is an undeniable 'unpleasantness' to be experienced by the offender.

<sup>146</sup> *ibid*, 547-8. I note that Bagaric appears to have contradicted himself, having earlier stated that '[e]ven where an offender does not breach a suspended sentence he or she has still undergone a significant punishment: the *risk* of imprisonment in the event of breach': Mirko Bagaric and Tanya Lakic, 'Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after *Kable*' (1999) 23 *Criminal Law Journal* 145, 147.

<sup>147</sup> Brignell and Poletti, n 114, 7-8. For consideration of the significant impact a prior suspended sentence may have on subsequent sentences, see [4.3.6.2].

<sup>148</sup> Tait, n 69, 146. Note also that acceptance of Bagaric's reasoning would lead to the conclusion that good behaviour bonds, deferred sentences and probation orders also do not amount to punishment.

<sup>149</sup> For further discussion of the prosecution of breaches in Tasmania, see [7.2].

<sup>150</sup> See analysis in [4.3.6.2].



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unpleasant consequences for the man. He was obliged to endure this punishment by his ruler, to illustrate what it was like to live under constant threat of death.<sup>151</sup>

In the oft-cited case of *Elliott v Harris (No 2)*, Bray CJ of the Supreme Court of South Australia observed that:

So far from being no punishment at all, a suspended sentence is a sentence of imprisonment with all the consequences such a sentence involves on the defendant's record and his future.... A liability over a period of years to serve an automatic term of imprisonment as a consequence of any proved misbehaviour in the legal sense, no matter how slight, can hardly be described as no punishment.<sup>152</sup>

This statement continues to be endorsed in courts across Australia.<sup>153</sup> On the other hand, the New South Wales Court of Criminal Appeal cited with approval the following passage in relation to the Canadian conditional sentence, thereby demonstrating a certain ambivalence about the punishment value of suspended sentences.

This metaphor [Sword of Damocles] exaggerates the severity of a conditional sentence. Even if a conditional sentence could be equated to a sword, it does not hang by a thread, but by a rope. And the only way this rope can break is if the offender himself cuts it. No one else can do so. This is within the exclusive and sole control of the offender. And with each passing day of the sentence, the 'sword' shrinks until finally it becomes a butter knife.<sup>154</sup>

### 1.5.2 Suspended sentences are seen as a 'let off'

#### 1.5.2.1 Public and media perceptions

The foregoing section examines whether suspended sentences amount to real punishment *at law*. There is also what Ancel described as a 'threat to the suspended sentence', 'that uncontrollable factor, public opinion and its panic reaction to certain types of offence'.<sup>155</sup> Suspended sentences appear to be regarded by the media, members of the public and victims,<sup>156</sup> as a 'let-off', while the offender is commonly perceived as 'walking free' or having received a slap on the wrist.<sup>157</sup> Tonry has

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<sup>151</sup> Roberts, n 2, 4.

<sup>152</sup> *Elliott v Harris (No 2)* (1976) 13 SASR 516.

<sup>153</sup> See for example *R v JCE* (2000) 120 A Crim R 18 (NSW CCA); *Latham v The Queen* (2000) 117 A Crim R 74 (WA CCA); *Humphrey v Police* [2000] SASC 391; *R v Foster* (2001) 33 MVR 565; *R v Zamagias* [2002] NSWCCA 17; *R v Y* (2002) 36 MVR 328; *R v Temby* [2003] SASC 230; *Peart v Police* (2003) 229 LSJS 194; *R v Whelan* (2004) 42 MVR 541; *R v Suri* [2004] SASC 80; *Sumner v Police* [2004] SASC 158; *DPP (Vic) v Oversby* [2004] VSCA 208; *DRI (a child) v Read* (2004) 42 MVR 566 (WA CCA); *R v Errigo* (2005) 92 SASR 562, [27] and *DPP (Vic) v Gany* (2006) 163 A Crim R 322.

<sup>154</sup> *R v Brady* (1998) 121 CCC (3d) 504, cited in *R v Tolley* [2004] NSWCCA 165.

<sup>155</sup> Ancel, n 3, 24.

<sup>156</sup> Michael Dawson, 'Sentencing: The Victims' Verdict' (2002) 23(2) *Victims' Voice* 1, 1; SAC Interim Report, n 67, [2.10]; [2.28] and Julian Roberts and Kent Roach, 'Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis' (2005) 9 *Queen's Law Journal* 560, 567-8. Roberts and Roach found great confusion amongst victims about the meaning of conditional sentences. The victims in their study were also 'unanimous' in their desire to have a copy of the reasons for sentence and the conditional sentence order imposed and several were also keen to have the sentence 'interpreted' by a lawyer or victims' representative as it was 'full of legal jargon'.

<sup>157</sup> Freiberg DP, n 91, 60 and Freiberg, n 96, 120. See also Morris, n 92, 139; *Crime, Justice and Protecting the Public*, n 91, [3.20] and Kate Warner, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355, 362.

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commented that the perceived leniency of intermediate sanctions is ‘the most difficult obstacle’ to their greater implementation.<sup>158</sup>

This poor public image is sometimes acknowledged by the courts. Over 30 years ago, the South Australian Court of Criminal Appeal observed:

If, as has been suggested, persons convicted and members of the public take a light-hearted view of a sentence which is suspended then time will, we believe, prove them to be wrong. If the convicted person does not take seriously the warning that any breach of his recognizance during its term will lead to the serving of the suspended sentence, he is likely to appreciate its truth if he is convicted of even a minor offence. The public will learn the truth about suspended sentences only if it takes the trouble to inquire what a suspended sentence really means. In this connection the news media could be of assistance.<sup>159</sup>

More recently, Perry J suggested that ‘it is abundantly clear that many members of the public do not regard a suspended sentence as any sort of a penalty at all’.<sup>160</sup> Justice Parker of the Western Australian Court of Criminal Appeal similarly observed in *Latham*<sup>161</sup> that because in ‘most cases a suspended sentence involves neither custodial nor coercive consequences’, it is understandable ‘that the community’s perception and the reality of this sentencing option is quite different from that of a sentence of a term of imprisonment to be served immediately’.

Recent examples of suspended sentences being imposed to the indignation of the media and the community include NSW radio broadcaster John Laws’ sentence for contempt.<sup>162</sup> One commentator described the sentence as the equivalent of being thrashed with a feather,<sup>163</sup> while another described Laws as ‘[t]oo prominent for prison and too flush to fine’.<sup>164</sup> In Victoria, the imposition of a wholly suspended sentence on an offender convicted of sexual assault in rather unusual circumstances<sup>165</sup> led to public condemnation, with a demonstration of some 10,000 protesters held on the steps of the Victorian Parliament and speakers calling for an end to the fiction of prison when the offender remained free. The outcry resulted in the issue of suspended sentences being referred to the then newly established

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<sup>158</sup> Michael Tonry, *Sentencing Matters*, Oxford University Press, New York (1996), 4.

<sup>159</sup> *R v Weaver* (1973) 6 SASR 265, 267.

<sup>160</sup> *Nicholls v Police* [2003] SASC 303, [39]. See also *R v Lord* [2001] NSWCCA 533, [35] and *Whelan v Police* (2003) 229 LSJS 93, [21]. Similar views were expressed by the Tasmanian judges and magistrates in their interviews with me: see [3.4.5].

<sup>161</sup> *Latham v The Queen* (2000) 117 A Crim R 74, [31].

<sup>162</sup> *R v Laws* (2000) 116 A Crim R 70 (NSWSC).

<sup>163</sup> Ackland, Richard, ‘Thrashed with a Legal Feather’, *Sydney Morning Herald*, Sydney, 8 September 2000. See also Warner, n 157, 362 and ‘Separate Law for Laws’, *Courier Mail*, Brisbane, 9 September 2000. It is in this context interesting to note Roberts’ suggestion that wealthy offenders be required to serve conditional sentences in a residential halfway house instead of in their own homes: Roberts, n 2, 166.

<sup>164</sup> O’Regan, Mick, ‘Media Report’, *Radio National*, ABC Radio, 7 September 2000, <http://www.abc.net.au/rn/talks/8.30/mediarpt/stories/s172985.htm>.

<sup>165</sup> See *DPP (Vic) v Sims* [2004] VSCA 129. For discussion, see Thérèse McCarthy, ‘A Perspective on the Work of the Victorian Sentencing Advisory Council and its Potential to Promote Respect and Equality for Women’ in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 165, 174.

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Sentencing Advisory Council.<sup>166</sup> Shortly thereafter, a female school teacher who had had a consensual sexual relationship with one of her male students also received a wholly suspended sentence, which caused a 'strong reaction' in Melbourne newspapers and on talkback radio.<sup>167</sup> The Victorian Attorney General was also recently required to defend the decision of a County Court judge who had imposed a three year wholly suspended sentence after calls that the judge be 'sacked because the sentence showed his priorities were out of step with the community's'.<sup>168</sup> The judge imposed the wholly suspended sentence on a former refugee who drove into the wall of a primary school while under the influence of alcohol, injuring five children, commenting that 'I defy anyone to regard your past without a twinge of sadness'. Perhaps unusually, the following comments by the sentencing judge were also reported in the media:

A suspended sentence is not always the soft option as it is characterised by the media and others. Indeed, for some it is a very hard, demanding and controlling sentence. A man convicted of a suspended sentence does not 'go free'. No, he goes away bearing a considerable burden. He may walk out of the court but he does not leave behind the embrace of the law.<sup>169</sup>

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<sup>166</sup> For background on the Sentencing Advisory Council (SAC), see Arie Freiberg, 'The Victorian Sentencing Advisory Council: Incorporating Community Views into the Sentencing Process' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 148. The referral of this issue to the SAC resulted in the recommendation that suspended sentences 'should be phased out in Victoria by December 2009': Sentencing Advisory Council, *Suspended Sentences: Final Report - Part 1*, Melbourne (2006) (SAC Final Report), Rec 1. The Victorian government has stated that it is 'considering the Council's recommendation to abolish suspended sentences for all cases and [is] waiting on a report from the Council on proposed new sentencing orders': Office of the Attorney-General, Victoria, 'No More Suspended Sentences for Serious Crimes' (*Press Release*, 22 August 2006). This report is expected to be released by the SAC in March 2008. For further discussion of suspended sentences in Victoria, see [2.2].

<sup>167</sup> Moncrief, Marc, 'Media Blamed in Teacher Sex Case', *The Age* (Melbourne), 11 November 2004, <http://www.theage.com.au/news/National/Media-blamed-in-teacher-sex-case/2004/11/11/1100131106680.html?from=top5>. The sentence was increased on appeal to a sentence of two years and eight months, suspended after six months: *DPP (Vic) v Ellis* (2005) 11 VR 287. Special leave to appeal to the High Court was refused: *Ellis v DPP (Vic)* [2005] HCATrans 751. See also 'Teacher Escapes Jail for Sex with Student', *Sydney Morning Herald* (Sydney), 1 March 2006, <http://www.smh.com.au/news/national/teacher-escapes-jail-for-sex-with-student/2006/03/01/1141095782248.html>, which reported on a female teacher who had sex three times with a 15-year-old male student. Barnett J took into account 'the extent of shame' the offender had already suffered and imposed a wholly suspended sentence for two years and four months. The sentence caused the South Australian Premier to call for a report on the sentence: see 'Anger at Sex Teacher's Light Sentence', *Sydney Morning Herald* (Sydney), 2 March 2006, <http://www.smh.com.au/news/national/anger-at-sex-teachers-light-sentence/2006/03/02/1141191777497.html> and Hough, Andrew, 'Family's Torment: Judge Lets Sex Teacher Go Free', *The Advertiser* (Adelaide), 2 March 2006, [http://www.theadvertiser.news.com.au/common/story\\_page/0,5936,18320020%255E910,00.html](http://www.theadvertiser.news.com.au/common/story_page/0,5936,18320020%255E910,00.html).

<sup>168</sup> Medew, Julia, 'Mercy for Drink-driver Outrages Families' *The Age* (Melbourne), 11 February 2006, <http://www.theage.com.au/news/national/mercy-for-drinkdriveroutrages-families/2006/02/10/1139542406276.html>.

<sup>169</sup> Caulfield, Christine, 'Mum's Anger as Drink-driver Walks', *Herald Sun* (Melbourne), 11 February 2006, [http://heraldsun.news.com.au/common/story\\_page/0,5478,18107305%255E2862,00.html](http://heraldsun.news.com.au/common/story_page/0,5478,18107305%255E2862,00.html). See also Crawford, Carly, 'Jail this Drunk', *Herald Sun* (Melbourne), 12 February 2006, [http://www.heraldun.news.com.au/common/story\\_page/0,5478,18118594%25E2862,00.html](http://www.heraldun.news.com.au/common/story_page/0,5478,18118594%25E2862,00.html) and Dowdell, Andrew, 'Senior Judge Defends Use of Suspended Sentences', *The Advertiser* (Adelaide), 18

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In another high-profile case, a wholly suspended sentence was imposed on a 19-year-old member of a prestigious South Australian family who had been convicted of endangering life.<sup>170</sup> The circumstances of the offence were somewhat unusual, in that the offender shot at the victim because he erroneously believed the latter had been following two young women, who were allegedly in fear of being raped. The victim, a newsagent delivering papers, lost an eye as a result. The sentence gave rise to significant public outcry, condemnation of the sentence by the Premier, and a successful Crown appeal.<sup>171</sup> Furthermore, even though the Premier did not call for his resignation, the then DPP ultimately resigned his position as a result of the controversy.<sup>172</sup>

There has been extensive debate in recent years about the role of public opinion in sentencing,<sup>173</sup> although the very notion of a 'public opinion' has been criticised by some.<sup>174</sup> There has also been significant discussion of the rise of 'penal populism', a term used to describe penal policy determined as a political response which favours

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December 2007, [http://www.news.com.au/adelaidenow/story/0,22606,22943274-2682,00.html?from=public\\_rss](http://www.news.com.au/adelaidenow/story/0,22606,22943274-2682,00.html?from=public_rss).

<sup>170</sup> *R v Nemer* (2003) 87 SASR 168. The Director of Public Prosecutions accepted a plea to the offence of endangering life, instead of attempted murder, which had originally been preferred.

<sup>171</sup> Notwithstanding the fact that the DPP had not objected to the imposition of a suspended sentence, the sentence was increased on appeal and an unsuspended sentence substituted. Special leave to appeal to the High Court was refused: *Nemer v Holloway*; *Nemer v The Queen* [2004] HCATrans 24.

<sup>172</sup> For discussion, see Johnson, Anne, 'Stateline (South Australia)', *ABC Television*, 1 August 2003, <http://www.abc.net.au/stateline/sa/content/2003/s915656.htm>; Chris Finn and Ryan Maguire, 'Nemer and the DPP' (2004) 26(3) *Bulletin* 20; Karen Earle, Rick Sarre and John Tomaino, 'Introduction: The Criminal Justice Process' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice*, Australian Humanities Press, Unley (2004) 1, 7-8; Jacobs, Michael, 'Conduct Unbecoming', *Adelaide Review*, December 2003, [http://www.adelaidereview.com.au/archives/2003\\_12/issuesandopinion\\_story4.shtml](http://www.adelaidereview.com.au/archives/2003_12/issuesandopinion_story4.shtml) and Jacobs, Michael, 'Public Prosecution', *Adelaide Review*, May 2004, [http://www.adelaidereview.com.au/archives/2004\\_05/issuesandopinion\\_story6.shtml](http://www.adelaidereview.com.au/archives/2004_05/issuesandopinion_story6.shtml).

<sup>173</sup> See eg Peter Sallman and John Willis, *Criminal Justice in Australia*, Oxford University Press, Melbourne (1984), 157; Alexis Durham, 'Public Opinion Regarding Sentences for Crime: Does it Exist?' (1993) 21 *Journal of Criminal Justice* 1; Kathleen Daly, 'Celebrated Crime Cases and the Public's Imagination: From Bad Press to Bad Policy?' (1995) 28 *Australian and New Zealand Journal of Criminology* 6; Green, n 63, 115-6; Nigel Walker and Nicola Padfield, *Sentencing: Theory, Law and Practice*, Butterworths, London (2nd ed, 1996), 75; Stephen Parker, *Courts and the Public*, Australian Institute of Judicial Administration, Melbourne (1998), 15; Stephen Shute, 'The Place of Public Opinion in Sentencing Law' [1998] *Criminal Law Review* 465; Francis Cullen, Bonnie Fisher and Brandon Applegate, 'Public Opinion About Punishment and Corrections' (2000) 27 *Crime and Justice* 1, 3; Ulla Bondeson, *Alternatives to Imprisonment: Intentions and Reality*, Westview Press, Boulder (2nd ed, 2002); Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers' Bulletin* 1; Julian Roberts, 'Public Opinion and Sentencing Policy' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002) 18, 26; *Crime, Courts & Confidence*, n 143, Ch 4; David Indermaur and Lynne Roberts, 'Perceptions of Crime and Justice' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report*, UNSW Press, Sydney (2005) 141, 152; Mackenzie, n 63, Ch 5 and David Green, 'Public Opinion versus Public Judgment about Crime' (2006) 46 *British Journal of Criminology* 131.

<sup>174</sup> Shadd Maruna and Anna King, 'Public Opinion and Community Penalties' in Anthony Bottoms, Sue Rex and Gwen Robinson (eds), *Alternatives to Prison: Options for an Insecure Society*, Willan Publishing, Cullompton (2004) 83, 87-90. Edney and Bagaric, n 19, [15.3], suggest that public opinion should be ignored altogether in sentencing, arguing that 'Seeking public views on sentencing is analogous to doctors basing treatment decisions on what the community thinks'. See also Bagaric and Edney, n 88, 133. For sentencers' views on the role of public opinion in sentencing, see [3.4.5].

popularity over other policy considerations.<sup>175</sup> There has also been considerable discussion of the relevance of fear of crime,<sup>176</sup> the role of the media in accurately

<sup>175</sup> Julian Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries*, Oxford University Press, Oxford (2003), 3. The authors pay homage to the classic text, Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control*, University of Chicago Press, Chicago (1970) by setting out the 'Honest Politician's Guide to Responding to Penal Populism', which proposes, *inter alia*, improving the measurement of public attitudes and the level of public knowledge of crime and criminal justice; improving the quality of information available to the media and responding to the media; focusing on effective punishment in the community and improving the public face of the criminal justice system: 167.

For further discussion of the phenomenon of penal populism, also referred to as law and order politics and public or popular punitiveness, see: Anthony Bottoms, 'The Philosophy and Politics of Sentencing Reform' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford (1995) 17, 40; Katherine Beckett, 'Political Preoccupation with Crime Leads, Not Follows, Public Opinion' (1997) 8(5) *Overcrowded Times* 1, 40; Ian Dunbar and Anthony Langdon, *Tough Justice: Sentencing and Penal Policies in the 1990s*, Blackstone Press, London (1998); Russell Hogg and David Brown, *Rethinking Law and Order*, Pluto Press, Sydney (1998); Adam Sutton, 'Crime Prevention: A Viable Alternative to the Justice System?' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Butterworths, Sydney (2000) 316, 328; Don Weatherburn, 'Law and Order Blues' (2002) 35(2) *Australian and New Zealand Journal of Criminology* 127; Arie Freiberg, 'Penal Populism and Public Opinion: Lessons from Five Countries - Book Review' (2003) 36 *Australian and New Zealand Journal of Criminology* 223; Hough, Jacobson and Millie, n 94; Weatherburn, n 76; Rick Sarre and Darren Parker, 'Policy-Making Criminal Justice' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice*, Australian Humanities Press, Unley (2004) 297; Rob Allen, 'What Works in Changing Public Attitudes: Lessons from Rethinking Crime and Punishment' (2004) 1(3) *Journal for Crime, Conflict and the Media* 55; John Pratt et al (eds), *The New Punitiveness: Trends, Theories, Perspectives*, Willan Publishing, Oregon (2005); Neil Hutton, 'Beyond Populist Punitiveness?' (2005) 7 *Punishment and Society* 243; Lyn Hinds, 'Challenging Current Conceptions of Law and Order' (2006) 10 *Theoretical Criminology* 203; Karen Gelb, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, Sentencing Advisory Council, Melbourne (2006), 4; David Brown, 'Time To Get Tougher on Crime - Again', *Sydney Morning Herald* (Sydney), 4 January 2007, 11; David Brown, 'Popular Punitiveness, the Rise of the "Public Voice" and Other Challenges to Judicial Legitimacy' (Paper presented at the Confidence in the Courts Conference, Canberra, 9-11 February 2007) and John Pratt, *Penal Populism*, Routledge, London (2007).

<sup>176</sup> See eg Mike Hough and David Moxon, 'Dealing with Offenders: Popular Opinion and the View of the Victims - Findings from the British Crime Survey' (1985) 24 *Howard Journal of Criminal Justice* 160, 171; Andrew von Hirsch, *Past or Future Crimes*, Manchester University Press, Manchester (1986), 169; David Indermaur, 'Public Perception of Sentencing in Perth, Western Australia' (1987) 20 *Australian and New Zealand Journal of Criminology* 163, 178; Mike Hough, Helen Lewis and Nigel Walker, 'Factors Associated with 'Punitiveness' in England and Wales' in Nigel Walker and Mike Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries*, Gower, Aldershot (1988) 203, 210; Bottoms, *ibid*, 47; Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Crime Perception and Reality: Public Perceptions of the Risk of Criminal Victimization in Australia*, Crime and Justice Bulletin No 28, NSW Bureau of Crime Statistics and Research, Sydney (1996); Mark Brown and Kenneth Polk, 'Taking Fear of Crime Seriously: The Tasmanian Approach to Community Crime Prevention' (1996) 42 *Crime and Delinquency* 398; Jane Sprott and Anthony Doob, 'Fear, Victimization and Attitudes to Sentencing, the Courts and the Police' (1997) 39 *Canadian Journal of Criminology* 275; Warwick Blood et al, *Fear of Crime*, Criminology Research Council, Canberra (1998); John Irwin, James Austin and Chris Baird, 'Fanning the Flames of Fear' (1998) 44 *Crime and Delinquency* 32; Deborah Lupton, 'Dangerous Places and the Unpredictable Stranger: Constructions of Fear of Crime' (1999) 32 *Australian and New Zealand Journal of Criminology* 1; Deborah Lupton, 'Part of Living in the Late Twentieth Century: Notions of Risk and Fear in Relation to Crime' (2000) 33 *Australian and New Zealand Journal of Criminology* 21; Zvekcic, Ugljesa, *Citizen's Appraisal of Security and Criminal Justice: An International Perspective*, Resource Material Series, No 56, UNAFEI, Tokyo (2000); John Pratt, 'Emotive and Ostentatious Punishment' (2000) 2 *Punishment and Society* 417; Arie Freiberg, 'Affective versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment and Society* 265, 269; Freiberg, n 96, 189; Roberts et al, *ibid*, Ch 4; Katherine Beckett and Theodore Sasson, *The Politics of Injustice*, Sage Publications, Thousand

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reporting sentencing decisions<sup>177</sup> and the role of the court in promoting better awareness of their decisions.<sup>178</sup>

Although I do not intend to examine the general literature in detail, I accept that public opinion does indeed play a role in sentencing, a view embraced by the public itself: in the recent Australian Survey of Social Attitudes, 63% of respondents agreed or strongly agreed that ‘Judges should reflect public opinion when sentencing’, with only 23% disagreeing.<sup>179</sup> As Roberts observes, the criminal justice system cannot function without public participation and the effectiveness of legislation can be dependent upon the degree of public support it attracts. In addition, if members of the public hold strongly negative views about the criminal justice system, they will be less likely to report crimes or serve as witnesses. Finally, the views of the public – or

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Oaks (2nd ed, 2004), 116; Weatherburn, n 76, 24; Brian Renauer, ‘Reducing Fear of Crime: Citizen, Police, or Government Responsibility?’ (2007) 10(1) *Police Quarterly* 41 and Murray Lee, *Inventing Fear of Crime*, Willan Publishing, Cullompton (2007).

Note that the Tasmanian Commissioner of Police, has suggested that ‘Community protection and reducing the fear of crime ought to be the prime objective of all sentencing practice... The ‘sublimated vengeance’ of punitive sentencing has no place in a liberal democracy’: Commissioner of Police, Richard McCreadie (Submission 2), Sentencing IP Responses, n 41.

<sup>177</sup> Ivan Potas and John Walker, *Sentencing the Federal Drug Offender: An Experiment in Computer-Aided Sentencing*, Australian Institute of Criminology, Canberra (1983), 11; David Brown, ‘A Changing Climate for Penal Reform’ (1986) (July) *Australian Society* 24, 24; Anthony Doob and Julian Roberts, ‘Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys’ in Nigel Walker and Mike Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries*, Gower, Aldershot (1988) 111, 131; Peter Grabosky and Paul Wilson, *Journalism and Justice*, Pluto Press, Sydney (1989); Philip Schlesinger and Howard Tumber, *Reporting Crime: The Media Politics of Criminal Justice*, Clarendon Press, Oxford (1994); Daly, n 173; Andrew Ashworth and Mike Hough, ‘Sentencing and the Climate of Opinion’ [1996] *Criminal Law Review* 776, 779; Justin Baer and William Chambliss, ‘Generating Fear: The Politics of Crime Reporting’ (1997) 27 *Crime, Law and Social Change* 87; Mike Hough and Julian Roberts, *Attitudes to Punishment: Findings from the British Crime Survey*, Home Office Research Study 179, London (1998), x; Keith Soothill and Chris Grover, ‘The Public Portrayal of Rape Sentencing: What the Public Learns of Rape Sentencing from Newspapers’ [1998] *Criminal Law Review* 455; David Dimovski, Kon Asimacopoulos and Nicholas Andrew, *Media and Crime: A Three Decade Analysis of Newspaper Coverage of Violent Crime in Sydney*, UTS Community Law and Legal Research Centre, Sydney (1998); Freiberg, *ibid*, 274; Richard Fox and Robert Van Sickle, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy*, Lynne Rienner Publishers, Boulder (2001); Nicholas Cowdery, ‘Whose Sentences: The Judges’, the Public’s or Alan Jones?’ (2002) 34 *Australian Journal of Forensic Sciences* 49; Rethinking Crime and Punishment, *Media and the Shaping of Public Knowledge and Attitudes Towards Crime and Punishment*, Esmée Fairbairn Foundation, London (2003); Roberts et al, n 175, 92; Don Weatherburn and David Indermaur, *Public Perceptions of Crime Trends in New South Wales and Western Australia*, Crime and Justice Bulletin No 80, NSW Bureau of Crime Statistics and Research, Sydney (2004), 7; Roberts, n 2, 136; Judith Buckingham, ‘“Newsmaking” Criminology or “Infotainment” Criminology’ (2004) 37 *Australian and New Zealand Journal of Criminology* 253; Earle, Sarre and Tomaino, n 172, 14-20; Sharon Casey and Philip Mohr, ‘Law-and-Order Politics, Public-Opinion Polls and the Media’ (2005) 12 *Psychiatry, Psychology and Law* 141; Indermaur and Roberts, n 173, 157 and Paul Mason, ‘Lies, Distortion and What Doesn’t Work: Monitoring Prison Stories in the British Media’ (2007) 2 *Crime, Media, Culture* 251.

<sup>178</sup> Sallman and Willis, n 173, 166; Mike Hough, ‘People Talking About Punishment’ (1996) 35 *Howard Journal of Criminal Justice* 191, 210; Hough and Roberts, *ibid*, 44 and Parker, n 173.

<sup>179</sup> Indermaur and Roberts, n 173, 153. Interestingly, those who agreed were about twice as likely to agree that ‘people who break the law should be given stiffer sentences’ than those who disagreed: 154. See also Lynne Roberts and David Indermaur, ‘Predicting Punitive Attitudes in Australia’ (2007) 14 *Psychiatry, Psychology and Law* 56.

the views which are perceived to be held by the public – will often shape the development of new criminal justice policies.<sup>180</sup>

In spite of the significance of public opinion on the criminal justice system, Mackenzie argues that ‘sentencing is one of the least generally understood functions undertaken by the courts, beyond a superficial coverage by the media of newsworthy and often sensational cases’.<sup>181</sup> In particular, there appears to be widespread misunderstanding and under-estimation of the severity of current sentencing practices.<sup>182</sup> It follows that the public’s views on crime and sentencing need to be well-informed, rather than merely misinformed clamouring for harsher sentences. The need for improved information is especially important since numerous studies indicate that the more information people are given about sentencing options, the less punitive their responses become.<sup>183</sup> Of particular relevance is the finding that when

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<sup>180</sup> Julian Roberts, 'Public Opinion, Crime and Criminal Justice' (1992) 16 *Crime and Justice* 99, 127-129. By way of example, the NSW Sentencing Council has recently been asked to undertake a survey of the NSW public to examine: the level of public confidence in the various aspects of the criminal justice system, including punishing offenders. The Council is to report to the Attorney General by July 2008. See [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll\\_scouncil.nsf/pages/scouncilnews#public\\_attitudes](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncilnews#public_attitudes). For recent discussion of the role of public participation in sentencing, see David Indermaur, 'Dealing the Public In: Challenges for a Transparent and Accountable Sentencing Policy' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 45 and Rob Allen and Mike Hough, 'Does It Matter? Reflections on the Effectiveness of Institutionalised Public Participation in the Development of Sentencing Policy' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 224. See also Julian Roberts, 'Sentencing Policy and Practice: The Evolving Role of Public Opinion' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 15.

<sup>181</sup> Mackenzie, n 63, 1.

<sup>182</sup> Roberts, n 2, 92. Several studies have shown that respondents consistently describe sentences as too lenient, regardless of changes in actual sentencing practices. See for example, Joanna Mattinson and Catriona Mirrlees-Black, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey*, Home Office Research Study 200, London (2000); Trevor Sanders and Julian Roberts, 'Public Attitudes toward Conditional Sentencing: Results of a National Survey' (2000) 32 *Canadian Journal of Behavioural Science* 199; Cullen, Fisher and Applegate, n 173; Judy Paulin, Wendy Searle and Trish Knaggs, *Attitudes to Crime and Punishment: A New Zealand Study*, Ministry of Justice, Wellington (2003); Mike Hough and Julian Roberts, *Confidence in Justice: An International Review*, Findings 243, Home Office, London (2004) and Karen Gelb, 'Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 68, 73.

<sup>183</sup> Nigel Walker and Mike Hough, *Public Attitudes to Sentencing: Surveys from Five Countries*, Gower, Aldershot (1988), 10; Monica Walker, *Interpreting Crime Statistics*, Clarendon Press, Oxford (1995), 218; John Tomaino, 'Guess Who's Coming to Dinner? A Preliminary Model for the Satisfaction of Public Opinion as a Legitimate Aim in Sentencing' (1997) 27 *Crime, Law and Social Change* 109; Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics*, Oxford University Press, New York (1997), 108; Hough and Roberts, *ibid*; Anthony Doob, 'Transforming the Punishment Environment: Understanding Public Views of What Should Be Accomplished at Sentencing' (2000) 42 *Canadian Journal of Criminology* 323; Freiberg, n 96, 42; Mark Israel and John Dawes, '"Something from Nothing": Shifting Credibility in Community Correctional Programmes in Australia' (2002) 2 *Criminal Justice* 5; Mike Hough and Alison Park, 'How Malleable Are Attitudes to Crime and Punishment? Findings from a British Deliberative Poll' in Mike Hough and Julian Roberts (eds), *Changing Attitudes to Punishment: Public Opinion around the Globe*, Willan Publishing, Cullompton (2002) ; Randy Gainey and Brian Payne, 'Changing Attitudes Toward House Arrest with Electronic Monitoring: The Impact of a Single Presentation?' (2003) 47 *International Journal of Offender Therapy and Comparative Criminology* 196; Heather Salisbury, *Public Attitudes to the Criminal Justice System: The Impact of Providing Information to British Crime*

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respondents are reminded of the cost of prison, their preference for it, compared with alternatives such as community service or fines, decreases.<sup>184</sup> More informed respondents are also less likely to regard current sentencing levels as too lenient, and confidence in the criminal justice system increases accordingly.<sup>185</sup> Even though it is generally accepted that ‘to the public nothing appears to punish like prison’,<sup>186</sup> studies indicate that respondents’ support for prison may also decline once respondents are reminded that the offender sentenced to prison will ultimately be released back into the community.<sup>187</sup>

Roberts has observed that public opinion clearly played a critical role in the demise of the English suspended sentence.<sup>188</sup> It is a penalty which appears to have an unusually high public profile – in the 1996 British Crime Study, participants were asked to identify non-custodial sentencing options. Fines were nominated by 58%, probation by 35% and suspended sentences by 30% of respondents. This is surprising, however, given they were ‘virtually unused’ at the time in England, accounting for only 1% of all sentences.<sup>189</sup>

In Sebba’s seminal study, participants regarded a fine of \$250 as more severe than a six month suspended sentence,<sup>190</sup> while a three year suspended sentence was regarded as less severe than a one year unsuspended sentence. A follow-up study found that ‘a suspended sentence involving the prospect of a *possible* prison sentence for a specified term is less burdensome than the *immediate* inconvenience of probation supervision or a financial penalty’.<sup>191</sup> In that study, suspended sentences of one and

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*Survey Respondents*, Home Office Online Report 64/04, London (2004) and Roberts and Indermaur, n 179, 61.

Note that two studies found some respondents were more severe following additional information: Becca Chapman, Catriona Mirrlees-Black and Claire Brawn, *Improving Public Attitudes to the Criminal Justice System: The Impact of Information*, Home Office Research Study 245, London (2002), 30 and Paulin, Searle and Knaggs, *ibid*, [5.7].

<sup>184</sup> Doob, *ibid*, Tables 3; 4 and Julian Roberts and Mike Hough, ‘Sentencing Young Offenders: Public Opinion in England and Wales’ (2005) 5(3) *Criminal Justice* 211, 227. Cost may however only be a factor for certain types of offences: in one study, mention of the cost of prison led respondents to favour a fine for property offences but not for minor personal violence offences: Doob and Marinos, n 63. Another study found that messages about the high cost of prison were ‘largely counter-productive’, as it ‘simply reinforced the popular view that prisons were full of unnecessary luxuries’: Rethinking Crime and Punishment, *What Do the Public Really Feel About Non-Custodial Penalties?*, Esmée Fairbairn Foundation, London (2002), 3.

<sup>185</sup> Jodi Lane, ‘Can You Make a Horse Drink? The Effects of a Corrections Course on Attitudes Toward Criminal Punishment’ (1997) 43 *Crime and Delinquency* 186 and Chapman, Mirrlees-Black and Brawn, n 183, xii.

<sup>186</sup> Roberts, n 2, 2.

<sup>187</sup> Doob, n 183, Tables 3; 4. See also Roberts et al, n 175, 34.

<sup>188</sup> Roberts, n 2, 134.

<sup>189</sup> Mike Hough and Julian Roberts, ‘Public Knowledge and Public Opinion of Sentencing’ in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002) 157, 161.

<sup>190</sup> Leslie Sebba, ‘Some Explorations in the Scaling of Penalties’ (1978) 15 *Journal of Research in Crime and Delinquency* 247, 260. It is conceded that at the time of the study, \$250 was worth more than today.

<sup>191</sup> Leslie Sebba and Nathan Gad, ‘Further Explorations in the Scaling of Penalties’ (1984) 24 *British Journal of Criminology* 221, 231. The study sought rankings for 36 sentence types from police



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three years were rated 30<sup>th</sup> and 26<sup>th</sup> respectively out of 36 sentencing options, while a one year suspended sentence combined with a \$1,000 fine was rated 23<sup>rd</sup>, thereby supporting the view above that adding some form of immediate punishment to a suspended sentence may make it more palatable in the eyes of the public. In another English study, a suspended sentence was regarded as the most lenient sentencing disposition of the choices given; the remaining sentences were ranked in the following ascending order of severity: probation, community service, fine (\$40; \$100), immediate imprisonment (1 month; 12 months).<sup>192</sup> These findings are in contrast with a study of magistrates, who ranked a six month suspended sentence immediately below a six month unsuspended sentence,<sup>193</sup> thereby highlighting the differences between public perception and the doctrinal position.

In a recent South Australian study, the only Australian research to systematically examine victims' views on suspended sentences, victims of crime ranked suspended sentence as the least severe community-based sentencing option, leading the study's authors to suggest that 'comments from victims of crime...provide further indication that suspended sentences are viewed as "no punishment" at all'.<sup>194</sup> This is particularly relevant, given international research indicating that victims are no more punitive than the general public.<sup>195</sup>

A significant part of the suspended sentence's poor public image appears to stem from confusion about the effect of a suspended sentence. Judge Hassett of the Victorian County Court has recommended suspended sentences as one of three areas in which he considered that the executive and the media could improve public confidence in the courts by better informing and educating the public. He stated:

There is much public confusion about this area. Endeavours should be made to profitably communicate to the public the point that such sentences are sentences of imprisonment because, clearly, a court must not impose a sentence of imprisonment unless satisfied that a non-custodial sentence is inappropriate.<sup>196</sup>

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officers, probation officers, prisoners and students. There was unanimity in the rankings for most severe and lenient sentences: death (1); imprisonment for life (2); \$50 fine (35); \$10 fine (36).

<sup>192</sup> Nigel Walker and Catherine Marsh, 'Does the Severity of Sentences Affect Public Disapproval?' in Nigel Walker and Mike Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries*, Gower, Aldershot (1988) 56, 60. The length of the sentence was not stated.

<sup>193</sup> Andreas Kapardis, *Sentencing by English Magistrates as a Human Process*, Asselia Press, Nicosia (1985), 176.

<sup>194</sup> Jenny Pearson and Associates Pty Ltd, *Review of Community Based Offender Programs: Final Report*, Justice Strategy Unit, Attorney General's Department (SA), Adelaide (1999), 40, discussed in Freiberg, n 96, fn 139.

<sup>195</sup> See eg Mike Hough and Julian Roberts, 'Sentencing Trends in Britain: Public Knowledge and Public Opinion' (1999) 1 *Punishment and Society* 11 and Candace McCoy and Patrick McManimon, 'Harsher is not Necessarily Better: Victim Satisfaction with Sentences Imposed under a "Truth in Sentencing" Law' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002) 197.

<sup>196</sup> Judge John Hassett, 'Sentencing and Public Perception of the Courts' (1997) 9 *Judicial Officers' Bulletin* 57, where it was suggested that there be more information about the daily realities of prison life, with the belief that a 'better understanding of these matters would bring home to the public the extent of the punishment involved in the service of a sentence of imprisonment'. See also Gerry Johnstone, 'Penal Policy Making: Elitist, Populist or Participatory?' (2004) 2 *Punishment and Society* 161, 168.

The public opinion research on Canadian conditional sentences of imprisonment is also relevant in this context. Research after such sentences had been available for four years demonstrated that many respondents did not understand what a conditional sentence is.<sup>197</sup> When given the choice between the correct definition and the definitions for bail and parole, only 43% correctly identified a conditional sentence.<sup>198</sup> Perhaps more perturbingly, a follow-up study three years later yielded similar results.<sup>199</sup> Other research in Canada has shown that when respondents were given detailed information about the conditions attaching to offenders' sentences, support for such sentences rose significantly. All respondents were aware that conditions would be imposed on the offender, but support rose to 64% in the group where the conditions were made explicit, compared with 27% in the control group, leading the authors to conclude:

This finding sheds some important light on the source of public opposition to conditional sentencing. It suggests that it is not the presence of the offender in the community to which members of the public object, but rather the perception that the offender is merely spending the time at home, without being expected to do more than refrain from further offending. Simply making the conditions explicit to participants resulted in an almost complete reversal of support for the two sanctions (conditional and conventional imprisonment).<sup>200</sup>

Perhaps surprisingly, doubling the length of sentence only increased support by 8%, suggesting that people are after appropriate conditions, not simply longer sentences. Accordingly, the authors suggest that in order to make community-based sentences

acceptable to the public, the court must ensure that significant conditions are imposed which have a real impact on the offender's life. In this way the sentence is not simply a 'warning' to the offender. If this can be accomplished, the public will support the imposition of a conditional sentence over a term of imprisonment, even for a serious personal injury offence.<sup>201</sup>

Another study sought respondents' views on the ability of prison and community custody to meet the traditional sentencing objectives of deterrence, denunciation and rehabilitation in respect of manslaughter, sexual assault and drug possession for the purposes of trafficking. There were few differences between the penalty types, and where statistically significant differences did emerge, they were in favour of community custody, which was regarded as more effective for all three objectives in respect of the drug offence, and more effective for rehabilitation in respect of sexual assault. Roberts concluded that 'in the eyes of the public, community custody can achieve the objectives of sentencing to the same degree as imprisonment, if the

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<sup>197</sup> It is important to note, however, that there are significant differences between Australian suspended sentences and the Canadian conditional sentence, as the latter is a sentence of imprisonment actually served in the community. For discussion, see **Table 1-1** and discussion in [2.5].

<sup>198</sup> Sanders and Roberts, n 182. See also *Rethinking Crime and Punishment, What Does the Public Think About Prison?*, Esmée Fairbairn Foundation, London, (2002).

<sup>199</sup> Trevor Sanders and Julian Roberts, 'Exploring Public Attitudes to Conditional Sentencing' in John Winterdyk, Linda Coates and Scott Brodie (eds), *Qualitative and Quantitative Research Methods*, Pearson, Toronto (2006).

<sup>200</sup> Sanders and Roberts, n 182, 204.

<sup>201</sup> *ibid*, 205. See also Roberts, n 2, 148.

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sanction carries conditions that restrict the lifestyle of the offender, and these conditions are made clear'.<sup>202</sup> These findings conform with other research on victims' support for such sentences, where Roberts and Roach found that 'to the victims, the conditions imposed on offenders serving conditional sentences are critical',<sup>203</sup> with several participants feeling that a conditional sentence could be effective if it was tough enough and if it was adequately enforced'.<sup>204</sup>

There is also Canadian research examining the popularity of conditional sentences on the basis of offence type. In one study, respondents were asked to choose between a conditional sentence and prison for various offence types.<sup>205</sup> Conditional sentences were most favoured over prison for assault causing bodily harm (77%), followed by assault (62%). It was less popular in respect of fraud by a lawyer involving a breach of trust (29%), and impaired driving causing bodily harm (25%). Although only 3% of respondents preferred a conditional sentence to prison in respect of sexual assault, support rose once the conditions attached to the order were made salient. Later research<sup>206</sup> showed conditional sentences to be favoured by 81% of respondents in a case of an assault resulting in a broken nose, while two-thirds of respondents preferred it in respect of domestic violence assaults. It would be of great interest and assistance to have similar research conducted in Tasmania in order to better understand the public's views on the use of suspended sentences in various contexts, rather than a general perception that they are poorly regarded by the Tasmanian public.<sup>207</sup>

### 1.5.2.2 Offenders' perceptions

Indermaur has decried the 'dearth of literature directly on offenders' perceptions of sentencing',<sup>208</sup> suggesting that there is a real risk that 'sentencing may have little

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<sup>202</sup> Roberts, *ibid*, 34; 149-150. Interestingly, the public in this study showed more confidence in community custody than judges who were asked similar questions in a separate study: see Julian Roberts, Anthony Doob and Voula Marinos, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey*, Report 2000-10e, Department of Justice, Ottawa (2000) and discussion in [3.4.1], (Q2) for the Tasmanian sentencers' responses to a similar question.

<sup>203</sup> Roberts and Roach, n 156, 587.

<sup>204</sup> *ibid*, 584.

<sup>205</sup> *ibid*.

<sup>206</sup> Sanders and Roberts, n 199. See also Voula Marinos and Anthony Doob, 'Understanding Public Attitudes Toward Conditional Sentences of Imprisonment' (1999) 21 *Criminal Reports* 31 and Department of Justice Canada, *Conditional Sentencing and the Views of the Community: Fact Sheet # 2* (2001), [http://www.justice.gc.ca/en/ps/rs/rep/qa/cs\\_2.pdf](http://www.justice.gc.ca/en/ps/rs/rep/qa/cs_2.pdf).

<sup>207</sup> Note however that a national survey funded by the Australian Research Council is set to commence in 2008 and will measure confidence in courts, punitiveness, perceptions of crime and sentencing, and fear of crime: see Kate Warner, 'Sentencing Review 2006-2007' (2007) 31 *Criminal Law Journal* 359, 361. It is to be hoped that the study will reveal findings on attitudes to suspended sentences.

<sup>208</sup> David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 16. See also Roberts, n 2, 92. For examples of sentencing research with offenders, see Dan Waldorf and Sheilagh Murphy, 'Perceived Risks and Criminal Justice Pressures on Middle Class Cocaine Sellers' (1995) 25 *Journal of Drug Issues* 11 and Lucia Benaquisto, *The Non-Calculating Criminal: Inattention to Consequences in Decisions to Commit Crime*, Unpublished paper, Department of Sociology, McGill University, Montreal (1997), discussed in Doob and Webster, n 76, 183. For anecdotes from prisoners and former prisoners in the United States, see Robert Johnson and Hans

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effect on the very population (potential offenders) it is intended for'.<sup>209</sup> Wood and Grasmick have also observed that punishments 'devised by legislators and practitioners are rarely (if ever) based on experiential data; they depend almost exclusively on guesswork by persons with no direct knowledge of serving various sanctions', and have likened this to a film critic rating a film without seeing it.<sup>210</sup>

There appears to be a generally accepted notion that offenders in receipt of a suspended sentence should consider themselves lucky, reflected in the observation that they are 'obviously more likely to be out celebrating than dashing to the Court of Appeal'.<sup>211</sup> In *Graham*,<sup>212</sup> the NSW Court of Criminal Appeal suggested that it 'would not be unusual for an accused person, the subject of a suspended sentence...not to appeal. The full implication of such a sentence might not have come home to such a person until faced with the reality of gaol'. Dengate similarly found that 'many offenders did not understand their obligations under the suspended sentence when it was imposed'.<sup>213</sup> Indeed, the Tasmanian DPP reports overhearing an offender, when asked what sentence he received, responding, 'Nothing! Suspended sentence'.<sup>214</sup> Similarly, Bottoms and McClean discuss an offender who had been given a suspended sentence. When asked why he did not appeal, he responded that he 'feared that the appeal court might give him a worse sentence, a fine'.<sup>215</sup>

Some of the studies discussed above also explored offenders' views of suspended sentences. Offenders in the Pearson study, for example, regarded suspended

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Toch (eds), *Crime and Punishment: Inside Views*, Roxbury, Los Angeles (2000) and Michael Santos, *Profiles From Prison: Adjusting to Life Behind Bars*, Praeger, Westport (2003).

<sup>209</sup> Indermaur, *ibid*, 17.

<sup>210</sup> Peter Wood and Harold Grasmick, 'Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison' (1999) 16 *Justice Quarterly* 19.

<sup>211</sup> Campbell, n 68, 294. See also Catherine Dengate, *The Use of Suspended Sentences in South Australia*, Department of Correctional Services, Adelaide (1978), 16 and Nick Boyden, 'Butter Knives into Swords: Section 12 Bonds (Suspended Sentences) and their Revocation' (2005) (June) *Law Society Journal* 73, 73. Home Office research indicates that only 2% of suspended sentence recipients from the Crown Court in 1992 appealed against their sentence, although no comparison of appeal rates for other sentence types is provided: see Stone, n 130, 408.

<sup>212</sup> *R v Graham* (2004) 62 NSWLR 252, [29] (Beazley JA, Wood CJ at CL and Hulme J agreeing). Note that this in turn has implications in the event of breach – having declined to appeal, the severity of the sentence cannot be reviewed; accordingly, the breach arguments and the basis for revocation becomes paramount: see *R v Tolley* [2004] NSWCCA 165 and *DPP (NSW) v Cooke* (2007) 168 A Crim R 379. See also discussion in [2.2.5].

<sup>213</sup> Dengate, n 211, 13.

<sup>214</sup> Tim Ellis SC, Submission 6, Sentencing IP Responses, n 41, 1. He told me this in our interview too, saying: 'I had one once...he got out of court and he saw his mate across the street who said 'what did you get?' and he said 'Nothing! Suspended sentence', adding 'they think it's Christmas! They wonder why they've spent all that time sweating about the court appearance': Meeting with DPP, n 67.

<sup>215</sup> Anthony Bottoms and John McClean, *Defendants in the Criminal Process*, Routledge and Kegan Paul, London (1976), 253. In its Discussion Paper, the SAC said it would consider the suggestion that some offenders may be actively seeking suspended sentences on the basis that they are less punitive than probation or fines: SAC DP, n 93, [7.10]. The issue was unfortunately not discussed further in the Interim or Final Reports.

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sentences as ‘moderately severe’.<sup>216</sup> In a recent New Zealand study, suspended sentences were the sentencing disposition about which there was least consensus amongst offenders. While 30% of respondents ranked a nine month wholly suspended sentence in the bottom four (out of 13) positions, 11% ranked it in the top four positions.<sup>217</sup> The Sebba and Nathan study asked 15 prisoners to rank 36 penalties.<sup>218</sup> Although a one year suspended sentence was somewhat perversely rated as more severe than a three year suspended sentence, both of these sentences (ranked as 25<sup>th</sup> and 26<sup>th</sup> respectively), were regarded as less severe than three years of probation (23<sup>rd</sup>) or one year of immediate imprisonment (19<sup>th</sup>). The fact that a one year suspended sentence combined with a \$1,000 fine was ranked directly below an 18 month unsuspended sentence suggests that offenders regard an immediate ‘price’ as significantly increasing the punitive effect of a suspended sentence.<sup>219</sup>

A recent Canadian study of offenders on conditional sentences of imprisonment involved focus groups with 25 offenders subject to such sentences, almost all of whom had house arrest imposed as a condition of sentence.<sup>220</sup> One of the key findings to emerge was the offenders’ perception that the conditional sentence required much more active involvement by the offender, compared with the inherent passivity of prison. Respondents made comments to the effect that on such a sentence ‘you’re not useless and can prove to everybody that you can change and be a better person’, ‘you use it to straighten out the issues that brought you into system’ and ‘you have to think about what you did and what you are doing’.<sup>221</sup> When respondents were asked to compare the conditional sentence with prison, it was generally regarded as being a better alternative, but a quarter found it was in fact more severe than prison. As one respondent said, ‘I didn’t like being behind bars, but being out is harder than being in jail’.<sup>222</sup> Respondents also commented on the impact of the conditions on other people, especially those living with the offender. Children were likely to be significantly affected, with some parents having to make up excuses why they couldn’t take their children out. One family member remarked that ‘I don’t

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<sup>216</sup> Pearson, n 194.

<sup>217</sup> Wendy Searle, Trish Knaggs and Kiri Simonson, *Talking about Sentences and Crime: The Views of People on Periodic Detention*, Ministry of Justice, Wellington (2003), 29.

<sup>218</sup> Sebba and Gad, n 191, 240.

<sup>219</sup> On this point, the TLRI has observed that requiring a wholly suspended sentence to include at least one condition that requires some positive action on behalf of the offender would make it ‘a more demanding sentence and make the place of suspended sentences in the sentencing hierarchy more plausible’: TLRI, n 19, 29-30.

<sup>220</sup> Julian Roberts, Lana Maloney and Robert Vallis, *Coming Home to Prison: A Study of Offender Experiences of Conditional Sentencing*, Department of Justice, Ottawa (2003).

<sup>221</sup> *ibid*, 8.

<sup>222</sup> *ibid*, 12; 16. For research suggesting that offenders may sometimes prefer prison to community alternatives, especially when the latter are longer or required to be served in a small community where it would be commonly known the offender is serving a sentence at home, see Ben Crouch, ‘Is Incarceration Really Worse? Analysis of Offenders’ Preferences for Prison over Probation’ (1993) 10 *Justice Quarterly* 67; Roberts, n 2, 49; 96-100. One study reported that ‘Several inmates...said that the brief term they were sentenced to serve would allow them to have some dental work done at state expense. Others appreciated the regular meals and shelter, and a chance to “chill out” and see old friends’: Wood and Grasmick, n 210.

think the judges understand when they hand down this sentence, that they're handing down the same sentence to the family.'<sup>223</sup> Although suspended sentences in Tasmania are not generally subject to such restrictive conditions as appear to be routinely imposed in Canadian conditional sentences, these comments are instructive in the context of some combination orders, for example, stringent treatment conditions or probation supervision.

### 1.5.3 There theoretical difficulties in imposing a suspended sentence

The reasoning process required to impose a suspended sentence has been dubbed the 'penological paradox'.<sup>224</sup> The paradox lies in the requirement that the court must first determine that no sentence other than imprisonment is appropriate, in order to embark upon the second step, namely, the decision to suspend the execution of the sentence. It has been suggested that 'the intellectual agility required to put suspension out of mind at the outset is very considerable, and to a degree artificial'.<sup>225</sup> In undertaking these 'mental gymnastics',<sup>226</sup> the sentencing court must revisit the very factors which it considered in arriving at the decision that imprisonment was the only appropriate sentence.

According to Bagaric, once all other sentences have been deemed too mild, it is farcical to claim that a suspended sentence is appropriate, when there are no new variables to tip the scales further in favour of a more lenient option.<sup>227</sup> One commentator said the two-stage process 'can only give the message to a bemused observer that the court has decided to pass an unjustifiable sentence'.<sup>228</sup> The complexity of the process is further compounded by the fact that 'the task of sentencing an offender, already hard, [is] made much harder by the knowledge that the sentence might never operate or, if it did operate, would operate at an unknown future date and in circumstances which could not be foreseen'.<sup>229</sup>

### 1.5.4 Suspended sentences cause net-widening

Some critics argue that any positive benefit suspended sentences may have on prison population is likely to be outweighed by net-widening, which occurs when sentencers use a more severe sentencing option in lieu of otherwise appropriate more lenient alternatives.<sup>230</sup> Ashworth, for example, suggests that:

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<sup>223</sup> Roberts, Maloney and Vallis, *ibid*, 13. The authors of the report referred to the provisions in New South Wales' and New Zealand's home detention schemes which require the consent of co-habitants before a home detention order can be imposed and raised as an issue for future research whether more should be 'done to ensure that the families (and spouses or partners) are comfortable with the prospect of sharing a residence with someone whose freedom has been highly restricted': 18.

<sup>224</sup> Jack Gemmell, 'The New Conditional Sentencing Regime' (1997) 39 *Criminal Law Quarterly* 334, 336. See also Bagaric, n 3, 538 and Freiberg, n 96, 120.

<sup>225</sup> Samuels, n 68, 400.

<sup>226</sup> Eric Stockdale and Keith Devlin, *Sentencing*, Waterlow Publishers, London (1987), [9.23].

<sup>227</sup> Bagaric, n 3, 539. See also Edney and Bagaric, n 19, [13.3.2.1].

<sup>228</sup> Campbell, n 68, 295.

<sup>229</sup> Advisory Council on the Treatment of Offenders, n 75, [10].

<sup>230</sup> For critique of the concept of net-widening, see Michael Tonry, 'Intermediate Sanctions in Sentencing Reform' (1995) 2 *University of Chicago Law School Roundtable* 391; Andrew Ashworth

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since its earliest days the suspended sentence has had no great impact in reducing the imprisonment rate, since those who would have been imprisoned immediately but received a suspended sentence were counterbalanced by those who were given a suspended sentence when they would never have received immediate imprisonment.<sup>231</sup>

Net-widening, also known as penalty escalation, has been described as ‘the bane of many alternative sanctions introduced over the past twenty years’,<sup>232</sup> and may be difficult to detect because the penalty imposed often seems more humane than the nominally more lenient alternative it replaces.<sup>233</sup> Suspended sentences at first blush appear more lenient in their effect than, for example, fines or community service orders, but may ultimately artificially elevate offenders further up the ‘sentencing ladder’ towards an unsuspended sentence.<sup>234</sup>

Other Australian jurisdictions have found net-widening occurring upon the introduction of suspended sentences. Tait, for example, compared the use of various penalties before and after the introduction of suspended sentences in Victoria and found that 40-50% of suspended sentences represented net-widening.<sup>235</sup> Research by the Judicial Commission following the reintroduction of suspended sentences in NSW indicates that the Local Court subsequently saw a decrease of 0.5% in penalties more severe than suspended sentences, compared with a decrease of 3.6% in less severe penalties,<sup>236</sup> meaning that 88% of suspended sentences used there represented net-widening. A similar, though less pronounced, trend was observed in the higher courts. More recent research indicates that the increased use of suspended sentences in NSW appears to have been wholly at the expense of non-custodial penalties, as the use of unsuspended sentences, periodic detention and home detention has either risen or remained constant since suspended sentences were reintroduced.<sup>237</sup>

The results from New Zealand also indicate net-widening, with figures suggesting that only 8% to 22% of offenders in receipt of a suspended sentence would otherwise have been sentenced to immediate custody.<sup>238</sup> On the other hand, Canada is reported to have experienced little net-widening upon the introduction of conditional

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and Andrew von Hirsch, 'Recognising Elephants: The Problem of the Custody Threshold' [1997] *Criminal Law Review* 187 and Rick Sarre, 'Deconstructing and Criminal Justice Reforms: Rescuing Diversionary Ideas from the Wastepaper Basket' (1999) 10 *Current Issues in Criminal Justice* 259.

<sup>231</sup> Andrew Ashworth, *Sentencing and Criminal Justice*, Butterworths, London (2nd ed, 1995), 294. This quote does not appear in subsequent versions of the text. See also Bottoms, n 107, 439; Bottoms, n 1, 5; Stephen Stanley and Mary Baginsky, *Alternatives to Prison*, Peter Owen, Washington (1984), 77; Fox and Freiberg, n 23, 228 and LCSCLJ, n 29, [5.78]-[5.85].

<sup>232</sup> Roberts, n 2, 117.

<sup>233</sup> Stanley Cohen, 'Community Control: A New Utopia' (1979) 47 *New Society* 609, 611. See also Stanley Cohen, 'Crime and Politics: Spot the Difference' (1996) 47 *British Journal of Sociology* 1.

<sup>234</sup> See [4.3.6.2] for analysis and discussion.

<sup>235</sup> Tait, n 69, 149. In other words, up to half of the offenders who received a suspended sentence would previously have received a sentence lower in the sentencing hierarchy.

<sup>236</sup> Brignell and Poletti, n 114, 11.

<sup>237</sup> Poletti and Vignaendra, n 106, 9-10.

<sup>238</sup> The Ministry of Justice reported that there were 2,938 suspended sentences imposed in 1994, the year after suspended sentences were introduced, but this was accompanied by a ‘drop in the total number of new prison receptions of just 643. However, more dramatically, the number of prison receptions in the sentence range of six months to two years fell by only 227’: Spier (1995), n 121.

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sentences.<sup>239</sup> This may be because the conditions attached to the sentence make it more onerous in its impact than most suspended sentences, thereby potentially causing sentencers to think more carefully before imposing it.

When suspended sentences were first introduced in England, Bottoms asserted that there was ‘widespread use of suspended sentences in place of fines and probation’.<sup>240</sup> It appears that only about 40% of suspended sentences were estimated to represent diversion from prison.<sup>241</sup> When partly suspended sentences were briefly available, there was once again evidence of net-widening, with Home Office data showing that about half of all partly suspended sentences would previously have been given wholly suspended sentences or non-custodial orders.<sup>242</sup> Legislative amendments which took effect in 2005 were designed to increase the use of suspended sentences.<sup>243</sup> Recent figures indicate that this sanction has once again been widely embraced.<sup>244</sup> A report by Mair, Cross and Taylor which involved interviews with probation officers suggests that it is ‘certainly not always used as an alternative to a custodial sentence; indeed in some Crown Courts it was thought to be displacing the Community Order’, with one probation officer likening it to magistrates ‘playing with a new toy’.<sup>245</sup> The authors also referred to an unpublished Home Office note which asserted that suspended sentence orders were not being used appropriately and that many of those in receipt of such an order would have previously been sentenced to a community sentence’.<sup>246</sup>

The possible incidence of net-widening in Tasmania will be discussed further in Chapter 4,<sup>247</sup> but its incidence does not mean that suspended sentences should not be used at all, but rather that their use needs to be more carefully considered and refined. Sarre’s comments in relation to diversionary practices are equally apposite in the context of suspended sentences:

Was Cohen accurate in his foreshadowing of the possibility of diversionary practices merely hastening an ever-widening circle of social control? Perhaps. But one should not abandon the *idea* of diversion simply because of the risks associated with its poor

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<sup>239</sup> Roberts, n 138, 233 and Roberts, n 2: Foreword by Andrew Ashworth, xi

<sup>240</sup> Bottoms, n 1, 8.

<sup>241</sup> *ibid*, 5. See also Sparks, n 125, 387.

<sup>242</sup> Cited in Anthony Bottoms, ‘Limiting Prison Use: Experience in England and Wales’ (1987) 26 *Howard Journal of Criminal Justice* 171, 196.

<sup>243</sup> See [2.3.3] for discussion.

<sup>244</sup> There were 158 suspended sentences imposed in the Magistrates’ Court in the first quarter of 2005, before the new provisions came into effect, compared with 1,570 in the final quarter of 2005; the increase in the Crown Court in the corresponding period was from 401 to 978: National Offender Management Service, *Sentencing Statistics Quarterly Brief: England and Wales, October to December 2005 (Crown Court and Magistrates’ Courts)*, Home Office (2006), Table 3. More recent figures indicate that 13,667 suspended sentence orders were imposed in the first six months of 2006: George Mair, Noel Cross and Stuart Taylor, *The Use and Impact of the Community Order and Suspended Sentence Order*, Community Sentence Series, Centre for Crime and Justice Studies, London (2007), 17.

<sup>245</sup> Mair, Cross and Taylor, *ibid*, 29.

<sup>246</sup> *ibid*, 26.

<sup>247</sup> See [4.3.2.1].



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implementation. Indeed, the risks of *ignoring* the value of ‘destructuring’ may be just as great.<sup>248</sup>

### 1.5.5 Suspended sentences favour middle-class offenders

It has been said that suspended sentences ‘are used largely as a means of appearing tough on those who are normally treated leniently anyway: middle class offenders and those with a settled life style’.<sup>249</sup> Certainly, the two-step process would seem more likely to benefit those who can claim a good employment history, lack of prior offending and stable family background, while disadvantaged members of society will be less favoured.<sup>250</sup> Ashworth goes so far as to say that since a good employment record and stable family may be associated with lower reconviction rates,

there may be a stark choice between insisting on equality before the law (and thus leaving such factors out of account) and allowing such factors to lead to a reduction in sentence-length because the longer sentence is not necessary for preventative reasons (and thereby, in effect, introducing social inequality into sentencing).<sup>251</sup>

In spite of potentially contributing to social inequality in sentencing, factors such as employment prospects and the support an offender may receive from his or her family remain relevant considerations in the sentencing process. Conversely, an offender’s difficult personal circumstances may also be regarded as a factor justifying the imposition of a suspended sentence,<sup>252</sup> so suspended sentences are not exclusively the domain of the white-collar offender.

### 1.5.6 Suspended sentences violate the proportionality principle

The principle of proportionality requires courts to impose sentences which are proportionate to the criminal conduct, ensuring that sentences imposed are of a severity that reflects the gravity of the crime in light of its objective circumstances.<sup>253</sup>

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<sup>248</sup> Sarre, n 230, 267. References omitted.

<sup>249</sup> David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study 103, London (1988), 35. For discussion of the relevance of good character to the decision to suspend, see [5.3.1.2].

<sup>250</sup> Ashworth, n 70, 281-3 and Warner, n 157, 363. Bottoms also points out that suspended sentences may result in excessively lenient sentences for those considered unlikely to re-offend, and excessively punitive sentences for those more likely to offend: Bottoms, n 1, 17.

<sup>251</sup> Ashworth, *ibid*, 281. This quote does not appear in subsequent editions of the text.

<sup>252</sup> See [5.3.1.8] for discussion.

<sup>253</sup> ALRC, n 18, [5.3]. For discussion, see especially the work of von Hirsch on ‘just deserts’: Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, Report of the Committee for the Study of Incarceration, Hill and Wang, New York (1976); von Hirsch, n 176; Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”’ (1990) 1 *Criminal Law Forum* 259; Andrew von Hirsch, *Censure and Sanctions*, Clarendon Press, Oxford (1993). See also HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford (1968); Richard Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489; Mirko Bagaric, ‘Proportionality in Sentencing: Its Justification, Meaning and Role’ (2000) 12 *Current Issues in Criminal Justice* 142; Bagaric, n 91, 163-4; Austin Lovegrove, *Sentencing the Multiple Offender: Judicial Practice and Legal Principle*, Research and Public Policy Series, No 59, Australian Institute of Criminology, Canberra (2004), Part 2 and Edney and Bagaric, n 19, Ch 5.

For criticism of desert theory, see Ted Honderich, *Punishment: The Supposed Justifications*, Penguin, Harmondsworth (1984), 35; 37; Victorian Sentencing Committee, n 23, [3.6]; Michael Tonry, ‘Proportionality, Parsimony, and Interchangeability of Punishment’ in Anthony Duff et al (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice*, Manchester University Press, Manchester (1994) 59 and Tonry, n 158.

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The principle has been accepted by the High Court as being ‘firmly established in this country’<sup>254</sup> and is recognised in the relevant legislation of several Australian jurisdictions,<sup>255</sup> although it is not referred to in the *Sentencing Act 1997* (Tas).<sup>256</sup>

There are three aspects to the argument that suspended sentences infringe the proportionality principle. A key aspect of proportionality is its ability to provide an overall limit on the severity of sentences<sup>257</sup> and it operates to define both the lower and upper limits of punishment, thereby preventing the imposition of sentences which are either unduly lenient or unduly harsh.<sup>258</sup> Bagaric argues that disproportionate sentences

risk bringing the entire criminal justice system into disrepute because such sentences offend the apparently pervasive intuitive belief, at the root of which is the broad concept of justice, that privileges and obligations ought to be distributed roughly in accordance with the degree of merit or blame attributable to each individual.<sup>259</sup>

Accordingly, although it ‘is rare for the principle of proportionality to be invoked as a basis for increasing a sanction, if the principle is to be treated seriously there is no basis for selective application’.<sup>260</sup> In *Dodd*,<sup>261</sup> for example, it was recognised that a sentence which does not give sufficient weight to the seriousness of the offence – that is, an excessively lenient sentence – violates the principle. On this basis, if an offence is so serious as to merit nothing less than a sentence of imprisonment, surely the sentence imposed cannot still be proportionate to the offence once it is suspended in its operation.<sup>262</sup> The effect of this argument is minimised, however, by increasing the penal bite of a suspended sentence through the imposition of conditions or combining the sentence with other orders.<sup>263</sup>

The second issue goes to the lack of certainty about suspended sentences. As Wasik suggests, there are ‘serious problems in incorporating conditional sentences within a

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<sup>254</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Hoare v The Queen* (1989) 167 CLR 348, 354.

<sup>255</sup> Eg *Criminal Law (Sentencing) Act 1988* (SA), s 10(k); *Sentencing Act 1991* (Vic), ss 5(1)(a), (2)(c), (d) and *Sentencing Act 1995* (WA), s 6(1). Section 16A(1) of the *Crimes Act 1914* (Cth) has been interpreted as a reference to the principle of proportionality: see *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370; Richard Fox and Arie Freiberg (eds), *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne (2nd ed, 1999), [3.503] and ALRC, n 18, [5.3]-[5.8].

<sup>256</sup> For discussion, see Warner, n 19, 287 and Edney and Bagaric, n 19, [5.2.2].

<sup>257</sup> Warner, n 10, [3.205].

<sup>258</sup> von Hirsch, n 253, 73.

<sup>259</sup> Bagaric, n 3, 560.

<sup>260</sup> *ibid*, 561.

<sup>261</sup> *R v Dodd* (1991) 57 A Crim R 349 (NSW CCA).

<sup>262</sup> Cf *R v Groom* [1999] 2 VR 159, where the Victorian Court of Appeal held by majority that the principle of proportionality is normally applied to restrain excessive severity in sentencing, and not to refuse leniency, and that under s 27(1), the sole criterion for deciding whether to suspend a sentence in whole or part is satisfaction as to its desirability in the circumstances. It was also said however that it would have been unexceptional to rely on the principle of proportionality in *granting* an order of suspension: [37]-[38] (Batt JA, Buchanan JA agreeing, Tadgell JA dissenting).

<sup>263</sup> The force of this argument would also be minimised if one severed the nexus between an unsuspended and a suspended sentence, as has previously been proposed: see SAC Interim Report, n 67, [1.5]; [2.47].

desert-based scheme'.<sup>264</sup> In Wasik's view, such a sentence is tantamount to a box labelled 'Box 13', with no immediate sanction on the outside, but a wide range of 'penal consequences which might or might not flow in the event of the commission of the next offence'. The sanction the suspended sentence represents is entirely unknown at the time of sentencing, and this is 'unacceptable, within a desert sentencing framework',<sup>265</sup> as proportionality requires sanctions to be clearly ranked in order of severity. One response to this issue is to recognise that in the Tasmanian context, the *Sentencing Act* 1997 is not a strictly desert-based scheme, and the principle of proportionality is a limiting principle only. In addition, attaching one or more conditions or orders to the sentence increases the certainty of what is likely to be contained in 'Box 13', as does a clear legal principle as to the likely consequences for the offender in the event of breach.

Finally, because of the suspended sentence's current positioning as an alternative to immediate imprisonment and its nominal status as the penultimate penalty on the sentencing ladder, the main sentencing option generally available to the court in the event of breach is immediate imprisonment. On the other hand, if the breaching offence is a minor one, imposing a sentence of imprisonment may be a disproportionately harsh response to the breach.<sup>266</sup> Furthermore, where an additional penalty, such as a fine, has been imposed at the time of original sentence, it may, in the event of a breach be 'difficult to avoid the conclusion that this amounts to double punishment for the original offence'.<sup>267</sup> A possible response is that a court acting on a breach of a suspended sentence should have sufficient discretion to ensure that disproportionate responses can be avoided, while ensuring that the sanctions for breach are subject to clear principles,<sup>268</sup> in order to maintain the integrity of the system.

The three arguments above are particularly forceful if one adheres to a desert-based scheme of sentencing,<sup>269</sup> however even within such a context, proportionality does not necessarily require the abolition of suspended sentences. Wasik suggests that 'if one were to sit down to design a desert-based sentencing scheme from first principles, it is unlikely that one would retain conditional sentences', but concedes that '[i]t may not always be the best course to seek abolition of conditional sentences'.<sup>270</sup>

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<sup>264</sup> Wasik, n 2, 55. See also von Hirsch, n 30, 169.

<sup>265</sup> Wasik, *ibid*. It has also been said that this indeterminacy of the sentence to be imposed undermines its efficacy as a sanction as the offender has 'little or no idea what to expect': Roberts, n 2, 5; 59.

<sup>266</sup> Cf *R v MacGregor* (2003) 138 A Crim R 361, where the South Australian Court of Criminal Appeal rejected the argument that there was a marked disproportion between the seriousness of the breaching offence and the length of the sentence activated on revocation of the suspended sentence.

<sup>267</sup> Bottoms, n 107, 442. Bottoms suggests that the 'only simple way to avoid this result would be to pay back the fine to the offender on reimprisoning him' but this may be difficult to administer.

<sup>268</sup> Wasik, n 2, 56-7.

<sup>269</sup> Cf the suggestion that 'Just deserts as a limiting principle defines the outward boundaries of punishment and assumes some other justification for its imposition': Warner, n 10, [3.303].

<sup>270</sup> Wasik, n 2, 56.

### 1.5.7 There are difficulties in dealing with breaches

There are conflicting views on the most appropriate means of responding to a breach of suspended sentence. On the one hand, the credibility of the suspended sentence and sentencing as a whole would seem to be dependent on predictability and sentences meaning what they say they mean. After all, if the court ‘clearly indicates that a further offence will lead to activation, it must fulfil that indication in the event of a further offence, otherwise it will lose credibility and authority’.<sup>271</sup> Roberts and Gabor note that lax enforcement or repeated warnings will undermine deterrent effect, and lead to a perception among offenders that such sentences are far from being equivalent to a true custodial sentence, which could in turn undermine public and professional confidence.<sup>272</sup> Brignell and Poletti similarly argue that the ‘forcefulness and reputation’ of suspended sentences depends...on the extent to which the courts ensure a tough approach to any breaches that may occur’.<sup>273</sup> Ashworth argues that ‘offenders’ perceptions of the seriousness of a suspended sentence would be significantly impaired if they knew that courts had a complete discretion whether or not to activate the suspended sentence on the occasion of a subsequent conviction’.<sup>274</sup> On this view, there is also little scope for indulgence for offenders in breach, who may be regarded ‘as especially heinous cases: the offender has not merely re-offended, he has done so in clear defiance of a court order and has, in a sense, betrayed the trust placed in him by the court or at least squandered an opportunity offered to him’.<sup>275</sup>

On the other hand, there are also powerful arguments for discretion and flexibility on breach. Excessively strict enforcement of the breach process may trigger high numbers of breach hearings, which may in turn undermine sentencers’ confidence in the sanction and wipe out any supposed reductions in prison admissions.<sup>276</sup> Judicial discretion enables the courts to take into account any changed circumstances between the time of the sentence and the time when the breach is brought before the court,<sup>277</sup> as well as past compliance with the suspended sentence. It also acknowledges ‘the reality of many criminal offenders is that they do not work within essentially middle-class cognitive and lifestyle frameworks where actions and consequences are carefully premeditated and calculated’.<sup>278</sup> In addition, such an approach

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<sup>271</sup> Samuels, n 68, 401. See also Nagin, n 76, 18; Doob, n 183 and Julian Roberts and Thomas Gabor, ‘Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration’ (2004) 44 *British Journal of Criminology* 92, 103; 106.

<sup>272</sup> Roberts and Gabor, *ibid*, 103.

<sup>273</sup> Brignell and Poletti, n 114, 8.

<sup>274</sup> Ashworth, n 70, 75. This quote does not appear in subsequent editions of the text. The SAC similarly contends that the less certain are the consequences of breach, the less its potential capacity for special deterrence’: SAC Final Report, n 166, [4.187].

<sup>275</sup> *ibid*, 242. See also Wasik, n 2, 52.

<sup>276</sup> Roberts and Gabor, n 271, 106.

<sup>277</sup> Freiberg, n 96, 8 and Mary Daunton-Fear, *Sentencing in South Australia*, Law Book Company, Sydney (1980), 165.

<sup>278</sup> Freiberg, *ibid*, 112.

accommodates trivial breaches<sup>279</sup> and recognises that in some cases, breach may be a result of a failure to provide support and services to an offender, rather than fault on the part of the offender.<sup>280</sup> Finally, this approach also means that there is an opportunity for the court to correct any net-widening or sentence inflation which may have occurred at sentencing, while avoiding the ‘back-door’ route to imprisonment. The issue of breaches will be revisited in later Chapters.<sup>281</sup>

### 1.6 Conclusion

The SAC observed in its Final Report that ‘[f]ew issues have divided the community as strongly as suspended sentences...This sentence polarises opinion and provokes high emotions’.<sup>282</sup> This Chapter sets out the background for a comprehensive discussion of suspended sentences. In particular, some of the key features of sentencing in Tasmania are introduced and a brief overview of the history of suspended sentences presented.

The arguments for suspended sentences are reviewed, namely, that they can be an effective form of denunciation and deterrence; they are a valuable tool for sentencers; and they enable offenders to avoid prison, especially for short sentences, as well as reducing the size of the prison population. There are also compelling arguments against suspended sentences: they do not amount to real punishment at law and are regarded as a ‘let-off’ by the public and offenders; there are difficulties with the process for imposing the sentence and dealing with breaches; they cause net-widening and violate the proportionality principle; and they favour middle-class offenders.

The arguments for and against suspended sentences both have force and are difficult to reconcile, as was acknowledged by the SAC:

The philosophical differences between those who accept that a suspended sentence is more severe than other non-custodial orders and who believe it to be an appropriate substitute for immediate prison time, and those who question the internal logic, position and continued need for such an order are fundamental and unlikely ever to be satisfactorily resolved.<sup>283</sup>

This thesis does not endeavour to resolve these differences. In my view, suspended sentences play a vital role in the Tasmanian sentencing regime and should not be abolished. The TLRI is similarly of the view that suspended sentences remain

a very useful sentencing option and that in a jurisdiction with no other sanctions in the sentencing hierarchy between a prison sentence and a community service order it is premature to contemplate abolition. If the range of custodial and intermediate non-

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<sup>279</sup> In Canada, for example, action was taken against an offender who arrived home 15 minutes after his curfew, and another who sat on the front step of his home while subject to home detention. Both matters were dismissed by the court: see Roberts, n 2, Ch 4, note 3.

<sup>280</sup> SAC Interim Report, n 67, [4.43].

<sup>281</sup> See especially [2.2.5], [3.4.6] and discussion in Chapter 7.

<sup>282</sup> SAC Final Report, n 166, vii.

<sup>283</sup> *ibid*, [3.74].

## 1. Background to suspended sentences

custodial options were to be extended and accepted by the courts, then abolition could be reconsidered.<sup>284</sup>

However, this is not to say that there are not ways of improving the use of suspended sentences in Tasmania. In this thesis, I aim to shed light on the principles and practice governing their use and advocate for greater clarity in relation to these issues in the future. In particular, I suggest that there is considerable scope for engaging with the judiciary, police and prosecutors, offenders, the media and the public to ensure that suspended sentences are imposed in appropriate circumstances and are regarded as a real and credible sentencing disposition. To this end, it is critical to take up the ‘communications challenge...to demonstrate that prison alternatives are capable of rehabilitating offenders while involving some element of punishment’.<sup>285</sup>

Roberts suggests that:

while increasing the punitiveness of community sanctions such as community custody will enhance their image in the eyes of the public, simply making these sanctions tougher will be insufficient to displace custody from its central role in popular conceptions of punishment. It will take something of a paradigm shift involving a transformation of popular views of the concept of imprisonment...

This paradigm shift will require the public to embrace a new form of custody. Part of the explanation for society’s attachment to institutional custody as a sanction lies in the mere familiarity of prisons, and of the ceremony of someone being admitted to an institution.<sup>286</sup>

The discussion in this thesis contributes to this paradigm shift by promoting a greater understanding – and hopefully therefore acceptance – of the use of suspended sentences in Tasmania.

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<sup>284</sup> TLRI, n 19, 26-7.

<sup>285</sup> Rethinking Crime and Punishment, *The Report*, Esmée Fairbairn Foundation, London (2004), 26.

<sup>286</sup> Roberts, n 2, 152-3.

## 2. SUSPENDED SENTENCES IN AUSTRALIA AND OVERSEAS<sup>1</sup>

*George Santayana observed that those who cannot remember the past are condemned to repeat it. Adapted to sentencing policy the aphorism might go: those jurisdictions that refuse to learn from the experiences of others are condemned to repeat their mistakes.*<sup>2</sup>

### 2.1 Introduction

Suspended sentences are currently available in all Australian jurisdictions, although the Victorian government is considering a recommendation by the SAC to phase out suspended sentences by 2009.<sup>3</sup> This Chapter provides a contextual framework for my analysis of the use of suspended sentences in Tasmania by examining the legislative provisions, case law and statistics on the use of such sentences across Australia. The High Court case of *Dinsdale*<sup>4</sup> is also discussed, especially the two-stage process, which requires a sentencer to first determine that a sentence of imprisonment is appropriate and only then decide whether to suspend sentence. The position in relation to suspended sentences in England and conditional sentences in Canada is also considered, as well as the reasons for abolishing suspended sentences in New Zealand.<sup>5</sup>

There will of course always be differences in sentencing dispositions between jurisdictions. A custodial sentence served in a prison in NSW, for example, will not be identical to one to be served in Queensland. Due to the inchoate nature of the suspended sentence, however, significant variations in the process of imposing the sentence, conditions attaching to it and options available on breach mean that the very nature of the sentence differs markedly around the country. Even more variations exist when suspended sentences in overseas jurisdictions are examined. In this Chapter, I discuss when a suspended sentence can be imposed in each jurisdiction and the process for doing so, both of which reveal an inconsistency of

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<sup>1</sup> For an earlier version of the Australian section of this Chapter, see Lorana Bartels, 'The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles' (2007) 31 *Criminal Law Journal* 113.

<sup>2</sup> Michael Tonry, 'Sentencing Reform Across National Boundaries' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford (1995) 268, 282.

<sup>3</sup> Office of the Attorney-General, Victoria, 'No More Suspended Sentences for Serious Crimes' (*Press Release*, 22 August 2006).

<sup>4</sup> *Dinsdale v The Queen* (2000) 202 CLR 321 (*Dinsdale*).

<sup>5</sup> I consider only these common law jurisdictions because their legal systems are most similar to Australia's. For some further international discussions of suspended sentences, see Thomas Weigend, 'Germany Reduces Use of Prison Sentences' in Michael Tonry and Kathleen Hatlestad (eds), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (1997) 177; Tapio Lappi-Seppälä, 'Sentencing and Punishment in Finland: The Decline of the Repressive Ideal' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries*, Oxford University Press, Oxford (2001) 92; Peter Tak, 'Sentencing and Punishment in the Netherlands' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries*, Oxford University Press, Oxford (2001) 151; Thomas Weigend, 'Sentencing and Punishment in Germany' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries*, Oxford University Press, Oxford (2001) 188; Effi Lambropoulou, 'Crime, Criminal Justice and Criminology in Greece' (2005) 2 *European Journal of Criminology* 211 and Josep Cid, 'Suspended Sentences in Spain: Decarceration and Recidivism' (2005) 52(2) *Probation Journal* 169.

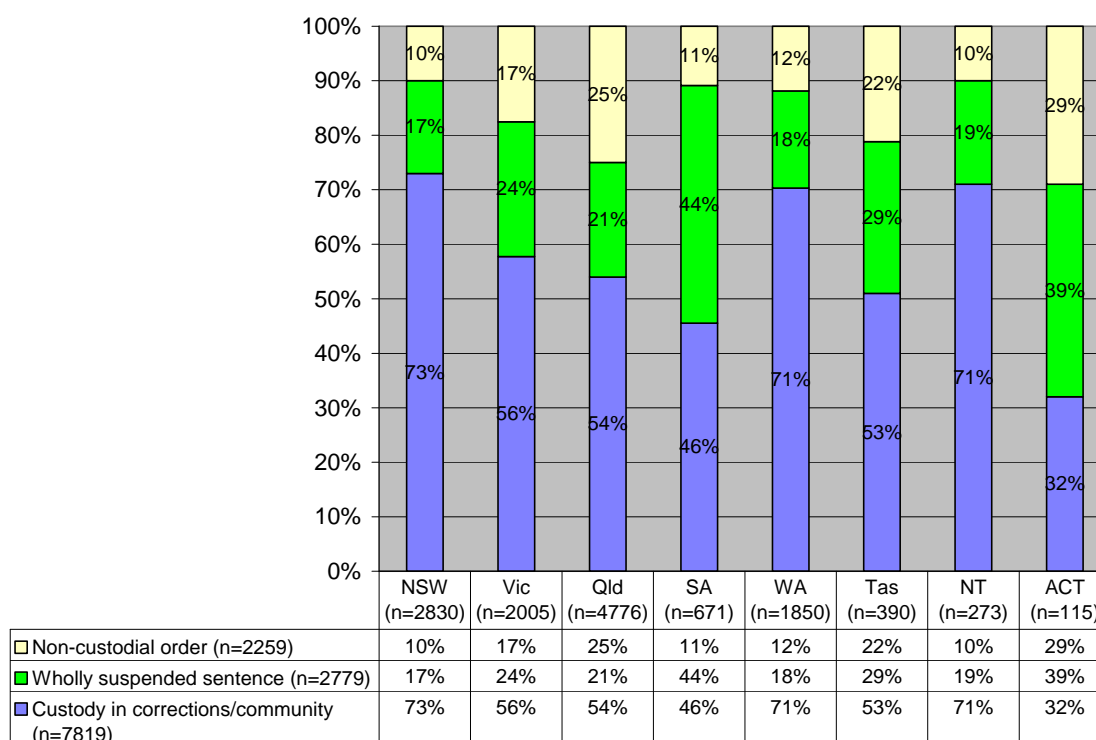
approach. The consequences of breach, which determine to a great extent the ultimate impact of suspended sentences on the prison population, are also discussed.

## 2.2 Australia

### 2.2.1 How are suspended sentences used?

The Australian Bureau of Statistics prepares annual reports on sentencing outcomes, although there has not been any detailed analysis of the variations in the use of suspended sentences, especially not against the background of a clear understanding of the differences in the legislative provisions and the case law surrounding their use. In this section I present some empirical data on the use of suspended sentences across Australia and discuss the types of offences for which suspended sentences are imposed. More detailed statistical information on the use of suspended sentences in Tasmania will be presented in Chapter 4.

Fig 2.1: Sentencing dispositions in the higher courts, 2005-2006



As Figure 2.1 demonstrates, the use of wholly suspended sentences ranges from 44% of all sentences in the higher courts<sup>6</sup> in South Australia in 2005-2006 to 17% in NSW, with a national average of 22%.<sup>7</sup> South Australia and the Australian Capital Territory (ACT), the two jurisdictions with the highest use of suspended sentences, also report the lowest use of ‘custody in corrections or the community’. The ACT is the only jurisdiction where suspended sentences are more favoured than custody,

<sup>6</sup> ‘Higher courts’ refers to the Supreme Court and District (or County) Courts. Tasmania, the Northern Territory and the Australian Capital Territory do not have intermediate courts and all relevant charges are dealt with in the Supreme Court. Details of the use of wholly suspended sentences in the Magistrates’ Courts are not provided by the Australian Bureau of Statistics.

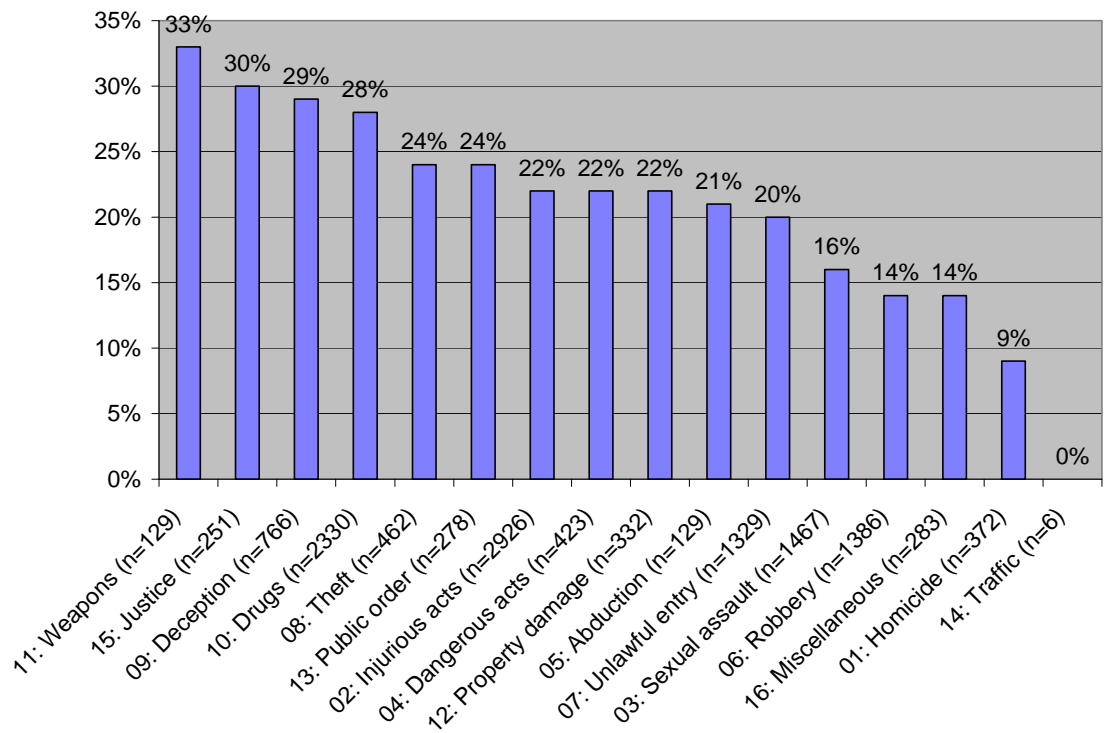
<sup>7</sup> Data based on figures in Australian Bureau of Statistics, *Criminal Courts Australia 2005-06*, Cat No 4513.0, Canberra (2007) (ABS), Table 11.



## 2. Suspended sentences in Australia and overseas

while non-custodial orders are only used more than suspended sentences in the ACT and Queensland.

*Fig 2.2: Likelihood of receiving a suspended sentence by offence type – higher courts<sup>8</sup>*



Suspended sentences are not available for certain types of offences in some jurisdictions and even where they are theoretically available, they are not necessarily widely used for all types of offences. Only 9% of offenders sentenced for homicide in 2005-2006 received a wholly suspended sentence;<sup>9</sup> this was the offence type for which an offender was least likely to receive such a sentence.<sup>10</sup> Figure 2.2 sets out the proportion of suspended sentences imposed in the higher court for each offence type. As can be seen, an offender is most likely to receive such a sentence for weapons and explosives offences (33%), followed by justice offences (30%). Other than road traffic offences, an offender is least likely to receive a suspended sentence for homicide (9%) and robbery and miscellaneous offences (14%).

Figure 2.3 demonstrates the types of offence for which wholly suspended sentences are most commonly imposed in the higher courts, that is, as a proportion of all suspended sentences imposed. Almost half of all suspended sentences are imposed

<sup>8</sup> ABS, n 7, Table 9, analysed by ASOC code.

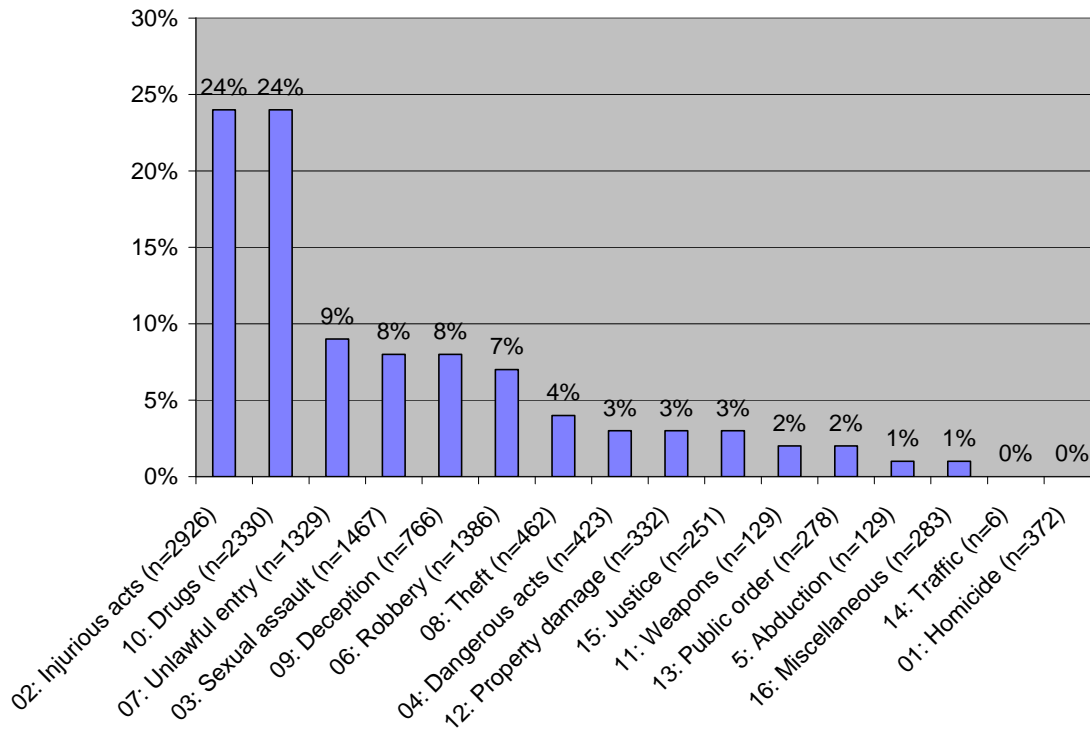
<sup>9</sup> These are more likely to be for manslaughter than murder, but there are some examples of wholly suspended sentences being imposed for murder: see *R v Luu* [2003] VSC 429; *R v Brown* [2005] VSC 63; *DPP (Vic) v Karaca* [2007] VSC 190 (attempted murder). For discussion of the use of suspended sentences for so-called mercy killings, see [5.3.2.1].

<sup>10</sup> There were in fact no suspended sentences imposed for offences under ASOC 14: Road traffic and motor vehicle regulatory offences, with only six cases overall, all of which were unsurprisingly resolved by way of non-custodial order.

For discussion of ASOC codes, see [4.2.2.1]. For ASOC abbreviations, see Appendix F.

for two categories of offence, acts intended to cause injury and drug offences, both 24%. A further 9% of all suspended sentences are imposed for unlawful entry with intent, while miscellaneous and abduction offences each comprise only 1% of all wholly suspended sentences imposed in the higher courts. Suspended sentences imposed for homicide and traffic offences each comprised less than 1% of suspended sentences imposed in the higher courts in 2005-2006.

*Fig 2.3: Most common offence types for suspended sentences – higher courts*



### 2.2.2 Imposing a suspended sentence

The sentencing legislation in most Australian jurisdictions except Tasmania sets out that imprisonment is a sentence of last resort.<sup>11</sup> In addition, in Victoria,<sup>12</sup> Western Australia<sup>13</sup> and the Northern Territory,<sup>14</sup> the relevant legislation expressly provides that a suspended sentence is available only where a sentence of imprisonment, if unsuspended, would be appropriate in the circumstances.<sup>15</sup> These provisions have been interpreted differently in the various jurisdictions, and not always in a way that

<sup>11</sup> See *Crimes Act 1914* (Cth), s 17A; *Criminal Law (Sentencing) Act 1988* (SA), s 11; *Sentencing Act 1991* (Vic), s 5(4); *Penalties and Sentences Act 1992* (Qld), s 9(2)(a)(i); *Sentencing Act 1995* (WA), s 6(4); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1), considered in relation to suspended sentences in *R v JCE* (2000) 120 A Crim R 18 and *Crimes (Sentencing) Act 2005* (ACT), s 10(2). There is no comparable provision in the *Sentencing Act 1995* (NT). For discussion of the lack of such a provision in Tasmania and the proposal to legislate for the principle of restraint, see [1.2].

<sup>12</sup> *Sentencing Act 1991* (Vic), s 27(3).

<sup>13</sup> *Sentencing Act 1995* (WA), s 76(2).

<sup>14</sup> *Sentencing Act 1995* (NT), s 40(3).

<sup>15</sup> For discussion of the Tasmanian sentencers' responses to the proposal to introduce such a provision, see [3.4.2], (Q11).

accords with position set out in *Dinsdale*<sup>16</sup> that a suspended sentence cannot be imposed unless a term of imprisonment is considered appropriate, all other options having first been rejected. The findings of my interviews with Tasmanian judicial officers discussed in Chapter 3<sup>17</sup> confirm the difficulty of applying the test laid down there.

### 2.2.2.1 The High Court's decision in *Dinsdale*

The leading Australian case in relation to suspended sentences is the High Court case of *Dinsdale*, which 're-affirmed the value of the suspended sentence in Australia'<sup>18</sup> and any discussion of suspended sentences would be incomplete without an understanding of that decision.

*Dinsdale* committed two indecent assaults on the nine-year-old daughter of friends. He was convicted following a jury trial and received an 18 month wholly suspended sentence upon consideration of his prospects for rehabilitation and the low risk of re-offending. The Crown appealed to the Western Australian Court of Criminal Appeal, which allowed the appeal and substituted an unsuspended sentence. The Court held that the suspended sentence was primarily to be used as 'an aid to rehabilitation', although this was 'by no means the sole purpose' justifying its use. Murray J, delivering the judgment of the Court, acknowledged that consideration could also be given to whether such a course was 'appropriate in mercy' or otherwise justifiable 'for good and sufficient reason'.<sup>19</sup> The offender then appealed to the High Court, arguing, *inter alia*, that the Court of Criminal Appeal had erred in attempting to prescribe too narrowly the circumstances relevant to a decision to suspend a term of imprisonment.<sup>20</sup> Kirby J delivered the main judgment, with which Gaudron and Gummow JJ agreed in a separate joint judgment. Justice Kirby considered some of the traditional criticisms of suspended sentences, declaring that:

the criticisms draw attention to the need for courts to attend to the precise terms in which the option of suspended sentences of imprisonment is afforded to them and to avoid any temptation to misapply the option where a non-custodial sentence would suffice. They also emphasise the need to keep separate the two components of such a sentence, namely the imposition of a term of imprisonment, and the suspension of it where that is legally and factually justified.<sup>21</sup>

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<sup>16</sup> *Dinsdale*, n 4. See also *York v The Queen* (2005) 225 CLR 466, where the High Court unanimously reinstated a five year wholly suspended sentence but did not make any substantive comments on the nature of suspended sentences.

<sup>17</sup> See [3.4.2].

<sup>18</sup> Arie Freiberg, *Pathways to Justice: Sentencing Review*, Department of Justice, Melbourne (2002), 123.

<sup>19</sup> *Dinsdale*, n 4, [46] (Kirby J).

<sup>20</sup> The following provisions of the *Sentencing Act 1995* (WA) are relevant: s 6(4) provides that a court must not impose a sentence of imprisonment unless it decides that the seriousness of the offence is such that only imprisonment can be justified, or the protection of the community requires it. Section 39(3) provides that a term of imprisonment to be served immediately should not be imposed unless the court is satisfied that a suspended sentence is not appropriate, while s 76(2) states that suspended imprisonment is not to be imposed unless imprisonment for a term or terms equal to that suspended would, if it were not possible to suspend imprisonment, be appropriate in all the circumstances.

<sup>21</sup> *Dinsdale*, n 4, [76].

## 2. Suspended sentences in Australia and overseas

Justice Kirby implicitly endorsed the English Court of Appeal's approach to the process for imposing a suspended sentence, namely, that the court must eliminate other sentencing options, such as discharge, probation or fine, and 'then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?'<sup>22</sup> He added:

The starting point, given emphasis by the terms of s76(2) [of the *Sentencing Act 1995* (WA)], is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a "soft option" when the court with the responsibility of sentencing is "not quite certain what to do".

The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without reoffending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty known to the law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrong-doing or even by offenders themselves. This disparity of attitudes illustrates the tension that exists between the component parts of this sentencing option: the decision to imprison and the decision to suspend.<sup>23</sup>

Justice Kirby considered the various approaches to determining the factors to be considered in resolving this tension, and held that 'to limit the exercise of the discretion to suspend a sentence of imprisonment by reference wholly, mainly or specially, to the effect which suspension would have on rehabilitation of the offender would constitute an error'. Instead of so confining the issue, he determined that:

the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term. This means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender...This necessitates the attribution of 'double weight' to all of the factors relevant both to the offence and to the offender – whether aggravating or mitigating – which may influence the decision whether to suspend the term of imprisonment.<sup>24</sup>

The court is required not only to consider the circumstances personal to the offender, but also to the objective features of the offence, which may in some cases outweigh the personal considerations of rehabilitation and mercy, and require that the prison sentence be immediately served, despite mitigating personal considerations.<sup>25</sup>

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<sup>22</sup> *R v O'Keefe* [1969] 1 All ER 426, 428.

<sup>23</sup> *Dinsdale*, n 4, [79]-[80]. Footnotes omitted.

<sup>24</sup> *ibid*, [84]. References omitted. Cf Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535, 539.

<sup>25</sup> *Dinsdale*, *ibid*, [84].

Gleeson CJ and Hayne J also allowed the appeal in a separate joint judgment and agreed that the discretion to impose a suspended sentence ‘is not confined by considerations relating to rehabilitation. These will often be significant, but there may be other relevant matters, of the kind taken into account by the trial judge in the present case’.<sup>26</sup> However, they suggested that the appropriate procedure was ‘inverted’ by the Court of Criminal Appeal having set the length of the term, and having ‘then searched for reason “in mercy” to suspend that term’.<sup>27</sup>

### 2.2.2.2 Doing the *Dinsdale* two-step

The difference in opinion between the majority and minority opinion has been the subject of extensive debate in the Western Australian courts,<sup>28</sup> with the Court of Criminal Appeal stating in *Etrelezis*<sup>29</sup> that ‘insofar as there is any inconsistency’ between the two approaches, ‘the approach adopted by the majority is that which is binding on this Court’. In *Duong v Western Australia*,<sup>30</sup> Pullin JA, with whom Roberts-Smith JA agreed, found the minority position to be ‘entirely consistent with the judgment of Kirby J’. The Court of Appeal has also confirmed that ‘the Court must not impose a sentence of imprisonment longer than it would otherwise have imposed simply because it has decided to suspend the sentence’.<sup>31</sup>

The two-stage approach proposed by Kirby J has generally been adopted around Australia,<sup>32</sup> but stated adherence to the principle does not appear to preclude deviation in practice. The NSW Court of Criminal Appeal, for example, endorsed this approach in *Blackman*,<sup>33</sup> but the Court has also held that it is unnecessary for sentencing judges to expressly state that they have applied the two steps in arriving at

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<sup>26</sup> *ibid*, [18].

<sup>27</sup> *ibid*, [13]. For discussion of the principle of mercy in sentencing, see *Cobiack v Liddy* (1969) 119 CLR 257, 269; *R v Osenkowski* (1982) 30 SASR 212, 212-3; Richard Fox, ‘When Justice Sheds a Tear: The Place of Mercy in Sentencing’ (1999) 25 *Monash University Law Review* 1 and Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [12.3.4].

<sup>28</sup> See *Latham v The Queen* (2000) 117 A Crim R 74, [12]; *Etrelezis v The Queen* [2001] WASCA 327; *Samuel v Western Australia* [2004] WASCA 154, [35] and *Attenborough v Western Australia* [2005] WASCA 132.

<sup>29</sup> *Etrelezis v The Queen* [2001] WASCA 327, [20] (Malcolm CJ, Wallwork and Templeman JJ agreeing).

<sup>30</sup> *Duong v Western Australia* (2006) 32 WAR 246, [32].

<sup>31</sup> *Mourish v Western Australia* [2006] WASCA 257, [11] (McLure JA, Steytler P and Wheeler JA agreeing). For further discussion of whether judicial officers extend the term of a suspended sentence, see [3.4.2], (Q13).

<sup>32</sup> Every jurisdiction except for the Northern Territory and Queensland appears to have considered this issue and adopted the majority position. See for example *R v SP* (2004) 149 A Crim R 48 (ACT CA) and *Langridge v The Queen* (2004) 12 Tas R 470 (Tas CCA).

<sup>33</sup> *R v Blackman* [2001] NSWCCA 121. See also *R v Zamagias* [2002] NSWCCA 17; *Brown and Reid v The Queen* [2006] NSWCCA 144; *R v Ryan and McPherson* (2006) 167 A Crim R 241; *R v Douglas* [2007] NSWCCA 31 and *R v JRD* [2007] NSWCCA 55.

the sentence imposed,<sup>34</sup> and has upheld sentences even when the two steps appear to have been elided.<sup>35</sup>

The Victorian courts have also generally accepted the two-stage process.<sup>36</sup> In *DPP (Vic) v Bright*, Redlich JA stated for the Court:

There is a two stage process involved in the making of orders such as...a suspended sentence. There must first be a determination as to what is the appropriate sentence without regard to the manner in which the sentence is to be served...The questions of proportionality and the appropriateness of the term of imprisonment must have been determined before the court can consider whether any of these sentencing options should be utilised. The alternatives available as to how the sentence may be served, relate to the implementation of the sentence and not to its imposition. The sentencing judge should not tailor the sentence to be imposed according to the manner in which he or she considers the sentence should be served. First, the appropriate sentence must be determined. Then the judge may determine if such an order should be made. The two steps should not be elided. The focus by his Honour appears to have been on the implementation of the sentence and not upon its appropriateness.<sup>37</sup>

This statement provides a clear endorsement not only of the two-step process but the reasons for it, namely that suspending a sentence is an issue going to the means of serving the sentence. Complying with the two steps laid down in *Dinsdale* is important if courts are to avoid net-widening.<sup>38</sup> The requirement not to ‘elide’ the two steps is critical once one bears in mind that a breached sentence can and commonly will result in an offender being required to serve the suspended sentence in prison. This issue was considered by the Victorian Court of Appeal in *Simmons*.<sup>39</sup> It was held there that once the sentencing judge had determined that it was not appropriate to send the offender to prison on account of his youth, it was therefore also not open to impose a suspended sentence.

In its Discussion Paper, the Victorian Sentencing Advisory Council (the SAC) sought submissions on whether the steps involved in making a suspended sentence order should be clarified,<sup>40</sup> suggesting that the legislation ‘could also more explicitly set out the steps a court should go through in making a suspended sentence order – for example, clarifying that before an order to suspend may be considered, a court must first determine that a sentence of imprisonment is the *only* appropriate sentence’.<sup>41</sup> Any responses to this issue were not referred to in the Interim or Final Reports, but in the latter, the SAC recommended that the legislation be amended to

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<sup>34</sup> See for example *R v Saldaneri* [2001] NSWCCA 480. Cf *R v Davies* [2007] NSWCCA 178, [32].

<sup>35</sup> Eg *R v Foster* (2001) 33 MVR 565; *R v Zamagias* [2002] NSWCCA 17; *R v Whelan* (2004) 42 MVR 541 and *R v Burns* [2007] NSWCCA 228.

<sup>36</sup> See *DPP (Vic) v Johnston* (2004) 10 VR 85 and *DPP (Vic) v Bright* (2006) 163 A Crim R 538. Cf *R v Glenn* [2005] VSCA 31, where the minority approach taken in *Dinsdale* was endorsed by Nettle JA, Vincent AJA agreeing. Cummins AJA in dissent did not refer to this issue.

<sup>37</sup> *DPP (Vic) v Bright* (2006) 163 A Crim R 538, [26].

<sup>38</sup> For discussion, see [1.5.4].

<sup>39</sup> *R v Simmons* [1998] 2 VR 14.

<sup>40</sup> Sentencing Advisory Council, *Suspended Sentences: Discussion Paper*, Melbourne (2005) (SAC DP), Q6.

<sup>41</sup> *ibid*, [8.33].

clarify that a court must not impose a longer term of imprisonment than would have been imposed had the sentence not been suspended, which would seem to enshrine the two-stage process.<sup>42</sup> This recommendation was not, however, taken up in recent legislative amendments.<sup>43</sup>

The South Australian Court of Criminal Appeal declared in *Temby*<sup>44</sup> that '[i]n the ordinary course, the court first determines the appropriate sentence and then considers the question of suspension'. In *Wessling v Police*, however, Besanko J stated:

I do not accept the defendant's submission that there is a two stage process under s 38(1) of the [*Criminal Law (Sentencing) Act 1988 (SA)*]. I think there is but one question, and that is whether, having regard to all the relevant sentencing considerations in the particular circumstances of the case, there exists good reason to suspend the sentences'.<sup>45</sup>

The Court of Criminal Appeal recently had further opportunity to consider this issue in *Stubberfield*,<sup>46</sup> where DeBelle J, with whom Vanstone J agreed, held that it is 'well settled that the correct approach...is to consider first the length of the sentence which is appropriate and then, having determined the sentence, to consider whether it is appropriate to suspend the sentence', but his Honour found that there was no ground for interfering with the sentencing judge's decision not to suspend '[e]ven if the sentencing judge did not proceed in accord with that principle'. Layton J in dissent held that 'as a consequence of the failure by the sentencing Judge to follow the correct sentencing principle, there is a material risk that his Honour fell into error in his reasons for rejecting suspension'. Perhaps surprisingly, neither judgment referred to the decision in *Dinsdale* and it may therefore be appropriate for the South Australian Court of Criminal Appeal to expressly consider the effect of the decision in *Dinsdale* and the applicability of the two-stage test laid down there to the exercise of the discretion to suspend. The fact that it is a difficult test to apply is considered further in Chapter 3 in the context of judicial interviews, where it is revealed that some judicial officers either don't apply the test correctly, while those who do apply the test mistakenly think they do not.<sup>47</sup>

### 2.2.2.3 Exercising the discretion to suspend

There is great variation in the degree of legislative constraint on the circumstances in which suspended sentences may be imposed and the test for so doing. The legislation in NSW,<sup>48</sup> Tasmania,<sup>49</sup> Western Australia<sup>50</sup> and the Australian Capital Territory<sup>51</sup>

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<sup>42</sup> Sentencing Advisory Council, *Suspended Sentences: Final Report - Part 1*, Melbourne (2006) (SAC Final Report), Rec 7.

<sup>43</sup> See *Sentencing (Suspended Sentences) Act 2006* (Vic).

<sup>44</sup> *R v Temby* [2003] SASC 230, [26]. See also *Landers v Police* (2002) 131 A Crim R 59 and *Craven v Police* [2003] SASC 307.

<sup>45</sup> *Wessling v Police* (2004) 88 SASR 57.

<sup>46</sup> *R v Stubberfield* [2005] SASC 383, [19].

<sup>47</sup> See [3.4.2], (Q3) for further discussion.

<sup>48</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 12(1)(a).

<sup>49</sup> *Sentencing Act 1997* (Tas), s 7.

does not set out any test for the imposition of a suspended sentence or restrictions on its availability – other than as to length of sentence in NSW and Western Australia. As set out above, Kirby J held in *Dinsdale* that the discretion to suspend is not limited primarily being an act of rehabilitation. In this context, it is also relevant to have regard to the case of *Wood v Samuels*, where Walter J stated:

there are no comprehensive specific criteria which tell a court when a case is one fit for a suspended sentence. But the perceived seriousness and the intrinsic character of the particular offence, and any element of persistence, can serve as important restraints on the choice of a suspended sentence. On the other hand, the likelihood that further criminal behaviour cannot reasonably be assumed is a matter which may well bring the offender within the scheme of the legislative policy which enables the rigours of a custodial sentence to be avoided...the considerations governing the choice between a custodial sentence and a suspended sentence cannot be identified by any constant ratio. The factors to be taken into account must invariably be different in the particular circumstances of each particular case.<sup>52</sup>

The Court of Criminal Appeal in Western Australia has declared that a ‘sentence of suspended imprisonment is a very serious sentencing disposition’<sup>53</sup> and has rejected the view that suspended sentences are only available for minor offences.<sup>54</sup> In *Cleak*,<sup>55</sup> by contrast, a case of penile-vaginal penetration without consent, it was held that the circumstances either of the offence or the offender would generally have to be ‘exceptional’ to justify suspension. This suggests that suspended sentences may not be considered a sufficiently severe sanction for some serious offences.

In *Guivarra*,<sup>56</sup> the NSW Court of Criminal Appeal rejected the Crown submission that there had to be something ‘special, exceptional or unusual’ about the case for the court to conclude that it was appropriate to suspend the sentence. Indeed, in *Brown and Reid*, the Court found that ‘the sentencing judge was required to give consideration to whether he should suspend the execution of the sentences of imprisonment he was about to impose, even though no such submission had been made on behalf of either applicant in the proceedings on sentence’.<sup>57</sup>

The test in Victoria is whether the court is ‘satisfied that it is desirable to do so in the circumstances.’<sup>58</sup> The SAC has recently reviewed the effect of this provision, including an extensive review of the case law.<sup>59</sup> In its Final Report, it recommended

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<sup>50</sup> *Sentencing Act 1995* (WA), s 76(1).

<sup>51</sup> *Crimes (Sentencing) Act 2005* (ACT), s 12.

<sup>52</sup> *Wood v Samuels* (1974) 8 SASR 465, 468-9.

<sup>53</sup> *DRI (a child) v Read* (2004) 42 MVR 566, [14].

<sup>54</sup> *Samuel v Western Australia* [2004] WASCA 154, [36]. See also *Long v Mayger* (2004) 142 A Crim R 289; *Western Australia v Skaines* [2006] WASCA 160 and *Church v Western Australia* [2007] WASCA 215.

<sup>55</sup> *R v Cleak* [2004] WASCA 72. See also *R v Chilvers* [2003] WASCA 87 and *L v Western Australia* [2007] WASCA 186.

<sup>56</sup> *R v Guivarra* [2002] NSWCCA 69. See also *Braithwaite v The Queen* [2005] NSWCCA 451.

<sup>57</sup> *Brown and Reid v The Queen* [2006] NSWCCA 144.

<sup>58</sup> *Sentencing Act 1991* (Vic), s 27(1). A similar provision exists in the Northern Territory: *Sentencing Act 1995* (NT), s 40(1).

<sup>59</sup> SAC DP, n 40, [4.18]-[4.35]; [6.22]-[6.56].



the introduction in the legislation of a non-exhaustive list of factors to guide the exercise of the discretion to suspend, suggesting that this would ‘promote community understanding of how the court reaches a decision to suspend. It may also help to promote more effective use of the order, both in terms of preventing re-offending and in terms of minimising the possibility of inappropriate use of the order’.<sup>60</sup> This proposal was embraced by the Victorian Government, which amended the *Sentencing Act 1991* (Vic) to provide the following list of factors which must be considered by the court in determining whether it is desirable to suspend a sentence:

- (a) the need, considering the nature of the offence, its impact on any victim of the offence and any injury, loss or damage resulting directly from the offence, to ensure that the sentence-
  - (i) adequately manifests the denunciation by the court of the type of conduct in which the offender engaged; and
  - (ii) adequately deters the offender or other persons from committing offences of the same or a similar character; and
  - (iii) reflects the gravity of the offence; and
- (b) any previous suspended sentence of imprisonment imposed on the offender and whether the offender breached the order suspending that sentence; and
- (c) without limiting paragraph (b), whether the offence was committed during the operational period of a suspended sentence of imprisonment; and
- (d) the degree of risk of the offender committing another offence punishable by imprisonment during the operational period of the sentence, if it were to be suspended.<sup>61</sup>

There has not yet been any case law on the effect of this new provision<sup>62</sup> and it will be interesting to see whether it alters the use of suspended sentences or has any influence on public understanding of – and possibly therefore support for – such sentences and sentencing generally.

The Victorian *Crimes Act 1958* provides that a court may not partly or wholly suspend a sentence imposed on a person who carried a firearm when committing an indictable offence<sup>63</sup> or carried an offensive weapon when committing a sexual offence.<sup>64</sup> The SAC also recommended amending the *Sentencing Act 1991* (Vic) to create a presumption against suspension of a prison sentence for specified ‘serious offences’, with wholly suspended sentences only to be available in ‘exceptional circumstances’.<sup>65</sup> This was adopted by the Victorian Government, which enacted legislation to provide that a court may not impose a wholly suspended sentence for a serious offence unless satisfied that doing so is ‘appropriate because of the existence of exceptional circumstances in the interests of justice’.<sup>66</sup>

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<sup>60</sup> SAC Final Report, n 42, [4.23] and Rec 3.

<sup>61</sup> *Sentencing Act 1991* (Vic), s 27(1A), which came into effect on 1 November 2006.

<sup>62</sup> See however *R v Hay* [2007] VSCA 147, [12].

<sup>63</sup> *Crimes Act 1958* (Vic), s 31A(2)(b).

<sup>64</sup> *Crimes Act 1958* (Vic), 60A(2)(b).

<sup>65</sup> SAC Final Report, n 42, Rec 5. Note that non-custodial orders would still be available for such offences.

<sup>66</sup> *Sentencing (Suspended Sentences) Act 2006* (Vic), s 4(2). A ‘serious offence’ is defined in *Sentencing Act 1991* (Vic), s 3, and includes murder, manslaughter, intentionally causing serious injury, rape, incest and sexual penetration of a child under the age of 16. For discussion of these

Perhaps surprisingly, the SAC's proposals do not appear to have been informed by the current restrictions in the Northern Territory, where wholly suspended sentences are not available for offenders convicted of sexual offences or of violent offences where the offender has previously been convicted of a violent offence.<sup>67</sup> In addition, in the Northern Territory, where an offender is convicted of an aggravated property offence, the court must impose a term of imprisonment or order the offender to participate in a community work order unless there are exceptional circumstances,<sup>68</sup> and may only impose a wholly suspended sentence upon the offender entering into a home detention order.<sup>69</sup> It is interesting to note, however, that a recent proposal by the Opposition to preclude the imposition of a suspended sentence for specified offences, including possession of child pornography; child sex offences; certain types of aggravated assault and rape was defeated by the Government.<sup>70</sup>

In South Australia, the test for imposing a suspended sentence is whether the court 'thinks that good reason exists for doing so',<sup>71</sup> although suspended sentences are not available for murder or treason or 'any other offence in respect of which a special Act expressly prohibits the reduction, mitigation or substitution of penalties or sentences'.<sup>72</sup>

In contrast with the approach recently taken in Victoria, Perry J declared in *Wacyk*<sup>73</sup> that the South Australian provision 'speaks for itself. It would be wrong to circumscribe those plain words by reference to any supposed formula or other gloss', stating that the exercise of the discretion to suspend must turn upon a careful evaluation of the overall circumstances of the case.<sup>74</sup> Perry J also considered that the exercise of the discretion would miscarry if it were approached 'with a preconceived view that any particular offence or class of offences may only properly be met by an immediate custodial term of imprisonment'. It has also been said that good reason 'may, of course, be apparent from a combination of circumstances'<sup>75</sup> and that '[i]t is

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provisions, see Thérèse McCarthy, 'A Perspective on the Work of the Victorian Sentencing Advisory Council and its Potential to Promote Respect and Equality for Women' in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 165.

<sup>67</sup> *Sentencing Act 1995* (NT), ss 78BA, 78BB. For discussion, see *Reid v Rowbottam* (2005) 15 NTLR 1 and *Hales v Jamilmira* (2003) 13 NTLR 14 respectively.

<sup>68</sup> *Sentencing Act 1995* (NT), s 78B(2).

<sup>69</sup> *Sentencing Act 1995* (NT), s 78B(3). The Northern Territory legislation does not prescribe a hierarchy of sentencing orders, but this provision seems to suggest that a community work order is a more severe penalty than a wholly suspended sentence.

<sup>70</sup> The Sentencing Amendment Bill 2006 (NT) was introduced into Parliament on 29 November 2006 but negated by the Government.

<sup>71</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 38(1).

<sup>72</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 37(1).

<sup>73</sup> *R v Wacyk* (1996) 66 SASR 530, 535.

<sup>74</sup> *ibid.*

<sup>75</sup> *R v Pham* [2003] SASC 386, [48]. For further recent discussion of the 'good reason' test, see *R v Hill* [2005] SASC 380, [44]-[51]; *R v Famiglietti* (2005) 243 LSJS 199, [33]-[38]; *R v Fowler* (2006) 243 LSJS 285, [47]-[58] and *R v Richards* (2006) 160 A Crim R 120. See also *R v Mangelsdorf, Perry and Richards* (1995) 66 SASR 60 and *R v Gjoka* (Unreported, SA CCA, Doyle CJ, Olsson and Lander JJ, 1 July 1997).

not necessary, when considering whether to suspend a sentence, for a sentencing judge to rehearse all of the relevant factors that point either way'.<sup>76</sup> David J recently said in *Tomlinson*<sup>77</sup> that when 'deciding whether there is good reason to suspend a sentence the following factors should be considered: issues of personal and general deterrence; the seriousness of the offences; and any mitigating circumstances particular to the defendant', but added that 'there is no formula for balancing these factors when deciding whether or not to exercise the discretion'.

In 1999, a new power was introduced in South Australia, whereby the court may also suspend a sentence on the grounds of ill health, disability or frailty of the offender.<sup>78</sup> Perhaps surprisingly in a jurisdiction where suspended sentences are so widely used, the practical effect of the provision appears to be limited. In the case of *Godwin*,<sup>79</sup> the offender was rendered an incomplete quadriplegic from the dangerous driving offence for which she was being sentenced, and also had three children to care for. Nevertheless, it was held that it was not unduly harsh to require her to spend time in prison despite her physical condition.<sup>80</sup> In *McNamara v Barrett*, Nyland found that:

Suspension pursuant to this particular section is not likely to be common. Other offenders will appreciate that it will only be possible to obtain a suspension of sentence on the grounds of ill health pursuant to this section if he or she is able to satisfy the Court of the very strict criteria for release contained therein.<sup>81</sup>

The Commonwealth *Crimes Act 1914* does not provide for suspended sentences but instead provides for recognizance release orders.<sup>82</sup> Section 20(1) provides that when making such an order, a court sentences a federal offender to a period of imprisonment but orders that the offender be released, either immediately (which is equivalent to a wholly suspended sentence) or after having served a specified period of imprisonment (partly suspended sentence), upon the giving of security that he or she will comply with certain conditions. The court is empowered to make such an order if 'it thinks fit',<sup>83</sup> but when imposing a sentence of between six months and three years, it must make a recognizance release order (as opposed to setting a non-parole period) unless satisfied that it is not appropriate to do so, having regard to the nature of the offence and the offender's antecedents.<sup>84</sup> There is no similar presumption in favour of making an order of a similar nature in relation to sentences of a particular duration in any other jurisdiction in Australia. The ALRC has recently

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<sup>76</sup> *R v Petrovski* [2005] SASC 330, [14].

<sup>77</sup> *R v Tomlinson* [2007] SASC 222, [76] (David J).

<sup>78</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 38(2c).

<sup>79</sup> *R v Godwin* (2001) 80 SASR 195.

<sup>80</sup> See also *R v Wilson* (2003) 225 LSJS 507; *Hebbberman v Police* [2002] SASC 267 and *R v Grgeta* [2004] SASC 407.

<sup>81</sup> *McNamara v Barrett* [2001] SASC 354, [22].

<sup>82</sup> A 'recognizance' is an undertaking whereby an offender acknowledges liability to pay a specified amount of money to the Crown unless he or she complies with certain conditions: Australian Law Reform Commission, *Same Crime, Same Time*, Report 103, Canberra (2006) (ALRC), [7.45]. The ALRC recommended replacing the term 'recognizance release order' with 'terminology that reflects its nature as a conditional suspended sentence: Rec 2-3.

<sup>83</sup> *Crimes Act 1914* (Cth), s 20(1).

<sup>84</sup> *Crimes Act 1914* (Cth), s 19AC.

recommended that this provision be repealed, arguing that such an order ‘should be imposed only if it is an appropriate sentence in the circumstances of the case, and that can be determined only after considering the purposes, principles and factors of sentencing and the factors relevant to the administration of the criminal justice system’.<sup>85</sup> The ALRC therefore recommended granting the court the discretion to partly or wholly suspend a sentence of imprisonment, regardless of its length.<sup>86</sup>

Consistent with the general approach to sentencing in Tasmania, there is no legislative guidance as to the circumstances in which it is appropriate to suspend a sentence<sup>87</sup> and the TLRI has recently opposed the imposition of offence-based restrictions on the power to order suspended sentences.<sup>88</sup> For a long time, the prevailing view was that the primary consideration was the effect on the offender’s rehabilitation,<sup>89</sup> but the Court of Criminal Appeal held in *Hawkins* that ‘the position as stated in cases such as *Percy* and *Causby*, would appear to be subsumed by the decision of the High Court in *Dinsdale*’.<sup>90</sup> This approach was later confirmed in *Langridge*, where the Court indicated that

insofar as *Percy* and *Causby* are in conflict with *Dinsdale*, the former should no longer be regarded as good law, and that all the circumstances of the case are relevant to the exercise of the discretion to conditionally suspend the whole or a part of a sentence of imprisonment that is appropriate to the case.<sup>91</sup>

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<sup>85</sup> ALRC, n 82, [7.58].

<sup>86</sup> *ibid*, Rec 7-7. There has been confusion in the past over when it is appropriate to impose such an order and when fixing a non-parole period is more appropriate: see *R v Sinclair* (1990) 108 FLR 370 (WA CCA) and *R v Ceissman* (2001) 160 FLR 252 (NSW CCA).

<sup>87</sup> Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (2nd ed, 2002), [9.205] and discussion in [1.2].

<sup>88</sup> Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008 (TLRI), 32.

<sup>89</sup> See *R v Percy* [1975] Tas SR 62; *R v Causby* [1984] Tas R 54; *Eastwood v Pearce* (Unreported, Tas SC, Brettingham-Moore J, 22 February 1985); *R v Sugg* (Unreported, Tas CCA, Neasey, Cosgrove and Brettingham-Moore JJ, 3 June 1985); *French v Marshall* (Unreported, Tas SC, Slicer J, 6 October 1993) and *R v Meers and Moles* (1998) 101 A Crim R 329.

<sup>90</sup> *Hawkins v The Queen* [2004] TASSC 55, [9] (Slicer J, Evans and Crawford JJ agreeing). Citations omitted.

<sup>91</sup> *Langridge v The Queen* (2004) 12 Tas R 470, [34]. See also *Harper v Gauden* (2003) 12 Tas R 57, where Cox CJ held that it would be an error ‘to suspend the sentence of imprisonment solely to achieve the aim of rehabilitating an offender without having regard to the need to deter others and to denounce the conduct in question’: [11].

### 2.2.3 How much and for how long?<sup>92</sup>

Table 2-1: Jurisdictional time limits on suspended sentences<sup>93</sup>

Jurisdiction	Maximum term of imprisonment	Operational period
<b>New South Wales</b> <sup>94</sup> Crimes (Sentencing Procedure) Act 1999, s 12(1)	2 years	Period 'not exceeding the term of the sentence'
<b>Victoria</b> <sup>95</sup> Sentencing Act 1991, s 27(2A)	3 years (higher courts) 2 years (Local Court)	Suspended term of imprisonment or 3 years (higher courts) or 2 years (Local Court), whichever is longer
South Australia Criminal Law (Sentencing) Act 1988, ss 38, 40	No term specified <sup>96</sup>	3 years
Queensland Penalties and Sentences Act 1992, s 144	5 years <sup>97</sup>	Not less than the term of imprisonment imposed, and not more than 5 years
<b>Western Australia</b> <sup>98</sup> Sentencing Act 1995, s 76(1)	5 years	2 years
Tasmania Sentencing Act 1997, s 7	No term specified	No term specified

<sup>92</sup> For data on the length of suspended sentences and operational periods imposed in Tasmania, see [4.3.2]-[4.3.3].

<sup>93</sup> Adapted from SAC DP, n 40, 31.

<sup>94</sup> For background, see New South Wales Law Reform Commission, *Sentencing*, Report 79, Sydney (1996), [4.20]-[4.23]; Kate Warner, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355; Lorana Bartels, 'Suspended Sentences in NSW' (2001) 8 *Criminal Law News* 81; Andrew Haesler, 'Sentencing Review: The *Crimes (Sentencing Procedure) Act 1999* Twelve Months On' (2001) 5 *The Judicial Review* 169; George Zdenkowski, 'Non-financial Non-custodial Sentencing Options in the *Crimes (Sentencing Procedure) Act 1999*' (2003) 6 *The Judicial Review* 189; Georgia Brignell and Patrizia Poletti, *Suspended Sentences in New South Wales*, Sentencing Trends and Issues, No 29, Judicial Commission of New South Wales, Sydney (2003) and Patrizia Poletti and Sumitra Vignaendra, *Trends in the Use of Section 12 Suspended Sentences*, Sentencing Trends and Issues, No 34, Judicial Commission of New South Wales, Sydney (2005); Judicial Commission of New South Wales, *Sentencing Bench Book*,

[http://www.judcom.nsw.gov.au/benchbks/sentencing/internet\\_main.html](http://www.judcom.nsw.gov.au/benchbks/sentencing/internet_main.html), [5-700]-[5-830].

<sup>95</sup> See David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143; Freiberg, n 18; SAC DP, n 40; Sentencing Advisory Council, *Suspended Sentences: Interim Report*, Melbourne (2005) (SAC Interim Report); SAC Final Report, n 42 and Nick Turner, *Suspended Sentences in Victoria - A Statistical Profile*, Sentencing Advisory Council, Melbourne (2007).

<sup>96</sup> In *R v M, H* (2007) 168 A Crim R 557, for example, a six year sentence was wholly suspended and *R v P, LWJ* [2007] SASC 361 (four years and nine months wholly suspended). Cf *R v Smith* (2007) 97 SASR 302, where it was said that 'where conduct is adjudged serious enough to attract a total head sentence of five years and two months, good reason to suspend can rarely be found': [53] (Vanstone J).

<sup>97</sup> The validity of a five year wholly suspended sentence was upheld by the High Court in *York v The Queen* (2005) 225 CLR 466.

<sup>98</sup> See Neil Morgan, 'Imprisonment As a Last Resort: Section 19A of the Criminal Code and Non-pecuniary Alternatives to Imprisonment' (1993) 23 *University of Western Australia Law Review* 299 and Neil Morgan, 'Business as Usual or a "New Utopia"? Non-custodial sentences under Western Australia's New Sentencing Laws' (1996) 26 *University of Western Australia Law Review* 364.

## 2. Suspended sentences in Australia and overseas

<b>Jurisdiction</b>	<b>Maximum term of imprisonment</b>	<b>Operational period</b>
<b>Australian Capital Territory</b> Crimes (Sentencing) Act 2005, s 12	No term specified <sup>99</sup>	No term specified
Northern Territory Sentencing Act 1995, s 40	5 years	Not more than 5 years from the date of the order (if wholly suspended) or a specified date (if partly suspended) <sup>100</sup>
<b>Commonwealth</b> <sup>101</sup> <i>Crimes Act 1914</i> , s20(1)(a), (b)	No term specified	Term not exceeding 5 years <sup>102</sup>

Table 2-1 sets out the legislative limitations on the maximum term of imprisonment which may be suspended and the maximum operational period, demonstrating considerable variation between jurisdictions, the significance of which becomes relevant in light of my analysis in Chapter 4.<sup>103</sup> The Australian Capital Territory and Tasmania are the only jurisdictions which set no legislative limits on either the length of the sentence or the period of suspension and the TLRI has recently opposed the introduction of a time-based restriction.<sup>104</sup>

New South Wales has the most restrictive provisions in respect of the maximum sentence that may be imposed, and at the time of its introduction, it was suggested that this would reduce its popularity and effect in reducing the prison population.<sup>105</sup> The NSW Judicial Commission has also suggested that it is ‘debateable whether restricting the term of the bond to the length of the period of suspension is a desirable policy’,<sup>106</sup> arguing that particularly for short suspended sentences, extending the term of the bond would provide for the possibility of increasing the probationary period and therefore would improve both the prospects of rehabilitation and increase community protection.

<sup>99</sup> See *IN v The Queen* [2002] FCAFC 135 and *R v Relph* [2002] ACTCA 6, where wholly suspended sentences of six and four years respectively were imposed.

<sup>100</sup> In *R v Lane* (2005) 149 NTR 16, an operational period which was shorter than the suspended portion of the sentence was overturned on appeal. The Court held that an offence ‘committed after the expiration of the operational period would not constitute a breach of the suspended sentence and the court would lose control of the situation in those circumstances’, although it might be appropriate to have such a sentence in ‘some exceptional circumstances’: [42].

<sup>101</sup> For background information on Commonwealth recognizance release orders, see Richard Fox and Arie Freiberg (eds), *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne (2nd ed, 1999); Warner, n 87, [9.216]; [9.623] and ALRC, n 82, [7.45]-[7.58].

<sup>102</sup> It may be possible for the period of recognizance to be longer than the period of imprisonment: *R v Smith* [2004] QCA 417.

<sup>103</sup> See discussion in [4.3.2]-[4.3.3].

<sup>104</sup> TLRI, n 88, 32.

<sup>105</sup> Warner, n 94, 361.

<sup>106</sup> Brignell and Poletti, n 94, 7. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30, Sydney (2006) (LCSCSJ), [5.98]-[5.102].

Judicial Commission figures indicate that two years is the most common term in NSW, accounting for 45% of suspended sentences imposed in the higher courts.<sup>107</sup> In Tasmania, by contrast, where the maximum period to be suspended is at large, the most common length for a wholly suspended sentence is six months. In fact, only 1% of wholly suspended sentences imposed in the Supreme Court in 2002-2004 were of exactly two years and no sentences of above two years were wholly suspended.<sup>108</sup> This would suggest that NSW judicial officers may be unduly moulding sentences to fit within the legislative limits, an issue which has been considered by the appellate courts there.<sup>109</sup> In the case of *Capar*,<sup>110</sup> the NSW Court of Criminal Appeal rejected the Crown's argument that the length of the sentence was selected in order to allow it to be suspended. The Court stated firmly in *McGourty*<sup>111</sup> that it is impermissible to adjust a sentence downwards so as to allow it to be served in a non-custodial environment, but it would seem from the clustering of sentences near the legislative maximum, that sentencers – whether consciously or otherwise – may in fact first decide whether to impose a suspended sentence, and then set the term of the sentence accordingly so as to come within the legislative requirements. This was conceded to have occurred in *Wilson*,<sup>112</sup> where the sentencing judge initially imposed a wholly suspended sentence of three years before being informed that the statutory limit was two years.<sup>113</sup>

Western Australia is the only jurisdiction where the maximum term of sentence which can be suspended is longer than the maximum operational period, which Morgan has suggested to be the 'wrong way round'.<sup>114</sup> I agree that it would seem to make more sense for the operational period to exceed the maximum portion of the sentence to be suspended, as this provides the court with sufficient flexibility to ensure the offender's compliance over a longer period. It would also seem odd that an offence committed before the end of the sentence if it were served would not be a

<sup>107</sup> Poletti and Vignaendra, n 94, 4. Sentences of 18 months accounted for a further 21%. In the Local Courts, which at the time only had jurisdiction to impose sentences of up to two years, sentences of 6 and 12 months accounted for 24% and 28% of all suspended sentences respectively. It would seem that magistrates are therefore less likely to mould the term of the sentence to fit within the legislative requirements, as they are more likely to impose shorter sentences overall. See NSW Sentencing Council, *Seeking a Guideline Judgment on Suspended Sentences: Interim Report*, Sydney (2005) (Sentencing Council), 5.

<sup>108</sup> For further data on the length of suspended sentences in Tasmania, see [4.3.2].

<sup>109</sup> Cf Freiberg, n 18, where it was suggested that the maximum length of any conditional order should be two years, as 'conditional orders which are too long increase the chances of breach, either of the conditions of the order or by further offending': 50.

<sup>110</sup> *R v Capar* (2002) 132 A Crim R 160.

<sup>111</sup> *R v McGourty* [2002] NSWCCA 335

<sup>112</sup> *R v Wilson* [2005] NSWCCA 414. See also *R v O'Connell* [2005] NSWCCA 265 and *Braithwaite v The Queen* [2005] NSWCCA 451.

<sup>113</sup> Note that Brignell and Poletti's findings led the Sentencing Council to consider whether it was appropriate for the Government to seek a guideline judgment from the Court of Criminal Appeal on suspended sentences, suggesting, *inter alia*, that the guideline should re-emphasise the two stage-process to avoid 'arriving at a term of two years or less in order for the sentence to be suspended': Sentencing Council, n 107, 7. The Council ultimately concluded, however, that 'an application at this present stage may be premature': 35.

<sup>114</sup> Morgan (1996), n 98, 385.

breach. The present position also runs the risk of misinterpretation by offenders, who may perceive the suspended sentence as having been imposed only for the duration of the lesser operational period.

### 2.2.4 The bite of the sentence

Part of the paradox and common criticism of suspended sentences is that the offender may be subject to no immediate penalty, other than the requirement to be of good behaviour,<sup>115</sup> but in many jurisdictions, this has been modified, so that an offender may be subject to extensive conditions which give the sentence more ‘teeth’. Roberts argues that if ‘the conditions of community custody are appropriately crafted and enforced, they can help promote desistance from further offending by weakening criminogenic relationships, and strengthening pro-social links’.<sup>116</sup> On the other hand, there are also ‘formidable’<sup>117</sup> problems with this approach, as there is a risk of ‘sanction stacking’. The English Advisory Council on the Penal System warned of the situation where an offender ‘might find himself fined, given a suspended sentence and placed under supervision in respect of a single offence,’<sup>118</sup> which may lead to further net-widening. In addition, attaching a fine may be seen by sentencers as the ‘price’ of suspending a sentence, which may result in ‘a wealthy offender retaining his liberty in circumstances in which a poorer offender would lose his liberty’,<sup>119</sup> thereby leading to discrimination amongst offenders according to their financial circumstances. Compulsorily attaching further orders may also cause difficulties in respect of an offender who has already been rehabilitated, is at low risk of re-offending and/or does not require any additional punishment other than a conviction and the threat of serving a sentence of imprisonment in the event of breach.<sup>120</sup>

This section considers the options available to the courts around Australia to increase the bite of a suspended sentence. A suspended sentence in a jurisdiction which

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<sup>115</sup> See discussion in [1.5.1].

<sup>116</sup> Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 9.

<sup>117</sup> Anthony Bottoms, ‘The Advisory Council and the Suspended Sentence’ [1979] *Criminal Law Review* 437, 441.

<sup>118</sup> Advisory Council on the Penal System, *Non-Custodial and Semi-Custodial Penalties*, Home Office, London (1970), [189]. Wasik also comments on ‘the uncertain relationship between the two parts of the combined sentence’ – if a fine is added, should it reduce the length of the suspended sentence? If so, this would suggest offenders can ‘buy’ their way out of prison; if not, however, this may lead to the conclusion that the offender has been doubly punished – that is, if a wholly suspended sentence would be a proportionate penalty, the imposition of a fine may make it too onerous a punishment’: Martin Wasik, ‘The Problem of Conditional Sentences’ (1994) 13(1) *Criminal Justice Ethics* 50, 55. On the other hand, in some circumstances, a suspended sentence combined with a fine may be the proportionate penalty. For discussion, see [3.4.3], (Q9). See also Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper 70, Canberra (2005), [7.90].

<sup>119</sup> Andrew Ashworth, *Sentencing and Penal Policy*, Weidenfeld and Nicolson, London (1983), 282. See also Anthony Bottoms, ‘The Suspended Sentence in England: 1967-1978’ (1981) 21 *British Journal of Criminology* 1, 18; Wasik, *ibid*; Bagaric, n 24; Warner, n 94, 363 and Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002), 12; SAC Interim Report, n 95, [2.20]-[2.24].

<sup>120</sup> SAC Interim Report, *ibid*, [2.15].



allows for extensive conditions and combination orders to be attached will clearly have a very different impact on an offender than where the only requirement is that the offender refrain from further offending. In Victoria<sup>121</sup> and Queensland,<sup>122</sup> the only condition that can be attached to a suspended sentence is the requirement that the offender not commit any offence punishable by imprisonment during the operational period of the order. In Western Australia, suspended sentences are also only subject to the condition that the offender not commit any imprisonable offence,<sup>123</sup> but in May 2006, a new sentencing option, the conditional sentence of imprisonment came into effect.<sup>124</sup> This sentence can only be imposed by the Perth Drug Court and must contain a program, supervision and/or curfew requirement.<sup>125</sup>

The desirability of introducing a conditional suspended sentence was recently reviewed in Victoria. The SAC recommended against introducing such a power, suggesting that ‘simply grafting conditions onto suspended sentence orders would fail to resolve more fundamental problems with these orders’.<sup>126</sup> In addition, Victoria places the strictest limits on combination orders: a fine is the only sentencing order which can be combined with a suspended sentence for a single offence,<sup>127</sup> although this restriction does not apply when sentencing an offender for multiple offences.

The power to suspend a sentence in NSW is subject to the condition that the offender enter into a good behaviour bond,<sup>128</sup> which may contain ‘such other conditions as are specified in the order by which the bond is imposed, other than conditions requiring the person under bond: to perform community service work, or to make any payment, whether in the nature of a fine, compensation or otherwise’.<sup>129</sup> The restriction on imposing a fine as a condition of the bond caused Wood CJ at CL some chagrin in *Laws*, when his Honour stated:

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<sup>121</sup> *Sentencing Act 1991* (Vic), s 31.

<sup>122</sup> *Penalties and Sentences Act 1992* (Qld), Part 8.

<sup>123</sup> *Sentencing Act 1995* (WA), Part 11.

<sup>124</sup> The legislation introducing the CSI, the *Sentencing Legislation Amendment Act 2004* (WA) was assented to on 14 October 2004 but only commenced on 21 May 2006. For discussion, see *Swains v Western Australia* [2007] WASCA 251.

<sup>125</sup> *Sentencing Act 1995* (WA), Part 12. A similar form of suspended sentence exists in NSW under the *Drug Court Act 1998* (NSW). The impact of the effect of CSI orders are to be monitored by the Western Australian Department of Justice: Western Australia, Parliamentary Debates, Legislative Assembly, 1 July 2004, 4761 (Jim McGinty, Attorney General).

<sup>126</sup> SAC Final Report, n 42, Rec 8.

<sup>127</sup> *Sentencing Act 1991* (Vic), s 49(1). The SAC has indicated previously that this power is rarely used: with less than 1% of all charges proved in the higher courts in 2003-4 attracting this combination: SAC Final Report, *ibid*, [2.28]. More recent data however, suggests that for the higher courts for the period 2001-2007, fines were imposed in 8% of partly suspended and 12% of wholly suspended sentences: Turner, n 95, Table 2. In the Magistrates’ Court in 2004-7, 33.6% of recipients of partly suspended sentence and 46.3% of those who received a wholly suspended sentence also received a fine: Table 1.

The court may also make a restitution, confiscation, compensation or disqualification order Part 4 of the *Sentencing Act 1991* (Vic), however these are not technically regarded as sentences.

<sup>128</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 12(1)(b).

<sup>129</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 95(c).

## 2. Suspended sentences in Australia and overseas

Had I power to impose an additional requirement that called for the payment of a fine, then I would have included an obligation to that effect in the conditions of the bond. Unfortunately, by reason of S95(c)(ii) of the Crimes (Sentencing Procedure) Act 1999, I am unable to do so.<sup>130</sup>

His Honour may however have been in error in his conclusion that he had no power whatsoever to impose a fine, as there is nothing in the legislation which prohibits *combining* a suspended sentence with a fine. In fact, section 15 of the *Crimes (Sentencing Procedure) Act 1999 (CSPA)* expressly states that a court may impose a fine on an offender convicted on indictment in addition to or instead of any other penalty that may be imposed for the offence.<sup>131</sup> There may therefore be greater scope in this regard than judicial officers currently appreciate.

A community service order, by contrast, cannot be imposed in combination with a suspended sentence. Section 13 of the *CSPA* provides that a court ‘may not, in relation to the same offence, make both a community service order and an order that provides for the offender to enter into a good behaviour bond’. At the time suspended sentences were reintroduced in NSW, this restriction was said to be one of the factors which would be ‘likely to reduce the popularity of suspended sentences and hence their impact in securing a reduction of the imprisonment rate’.<sup>132</sup>

In *Bugmy*,<sup>133</sup> the sentencing judge ordered the offender to stay away from a certain town unless he received permission from the judge to go there. The NSW Court of Criminal Appeal set aside the condition as insufficiently certain and too harsh, and because it is inappropriate for a judge to supervise the offender. The Court also set out the following guiding principles for the imposition of a bond:

First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation.

Secondly, the conditions must each be certain, defining with reasonable precision conduct which is proscribed.

Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.<sup>134</sup>

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<sup>130</sup> *R v Laws* (2000) 116 A Crim R 70, [47].

<sup>131</sup> For comment, see Warner, n 94, 361.

<sup>132</sup> *ibid.*

<sup>133</sup> *R v Bugmy* [2004] NSWCCA 258.

<sup>134</sup> *ibid.*, [61]. For comment, see Zdenkowski, n 94, 192, where it is suggested that the discretionary imposition of conditions creates a flexible sentencing tool which is sensitive to the offender’s particular circumstances, but there is also a responsibility to ensure that such powers are not exercised inappropriately or oppressively. In Canada, conditions such as a prohibition on watching television have been criticised because they ‘invite a recalcitrant response from the offender, generate insuperable problems for supervisory personnel, and can provoke widespread public criticism’: Julian Roberts, ‘The Hunt for the Paper Tiger: Conditional Sentencing after *Brady*’ (1999) 42 *Criminal Law Quarterly* 38, 65.

South Australia also requires the offender to enter into a good behaviour bond,<sup>135</sup> which may include one or more of an extensive array of conditions, including supervision, community service, residence restrictions, treatment, abstention from drugs or alcohol, education programs and ‘any other condition that the court thinks appropriate’.<sup>136</sup> In addition, where a sentence is suspended on the grounds of ill health or disability, the court may include a home detention condition, whereby the offender is required to reside at a specified place for up to a year, and may only leave the premises for certain purposes, including attending work or obtaining medical treatment.<sup>137</sup>

The Commonwealth legislation provides that when sentencing an offender for a federal offence, the court may, if it thinks fit, order the release of the person, ‘upon security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he will comply with specified conditions’, including being of good behaviour, making reparation, restitution or compensation or paying a pecuniary penalty and complying ‘with any other conditions set by the court, including supervision by a probation officer’.<sup>138</sup> In *Theodossio*,<sup>139</sup> the offender was convicted of dishonestly claiming the sole parent pension and released on a recognizance release order with conditions. The Queensland Court of Appeal set aside the condition that she not apply for that pension for a set period of time on the basis that it was contrary to public policy, because it would prejudice the proper support of the offender’s child.

There appears to be some confusion as to whether community service can be ordered as a condition of a Commonwealth recognizance release order, with the Queensland Court of Appeal holding in *Shambayati*<sup>140</sup> that it could not be attached to a conditional release order because a community service order did not operate outside the context of the relevant provision of the *Penalties and Sentences Act 1992* (Qld), which was not applicable to federal offenders released pursuant to section 20(1) of the *Crimes Act 1914* (Cth). In contrast, the Full Court of the Supreme Court of South Australia had earlier held in *Adams v Carr*<sup>141</sup> that community service orders could be attached to an order under section 20(1).

The ALRC has recently recommended that the court also be empowered to order the offender to undertake a rehabilitation program, undergo specified medical or psychiatric treatment; or be subject to the supervision of a probation officer and obey

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<sup>135</sup> *Criminal Law (Sentencing) Act 1988* (SA), ss 38, 42. For discussion about the nature of such bonds, see *Nollen v Police* (2001) 78 SASR 421, [52].

<sup>136</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 42. Note however *Gomez v Police* [2005] SASC 64, where Besanko J disallowed a condition that the offender write a letter of apology to the victim.

<sup>137</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 38(2c).

<sup>138</sup> *Crimes Act 1914* (Cth), s 20(1).

<sup>139</sup> *R v Theodossio* [2000] 1 Qd R 299.

<sup>140</sup> *Shambayati v The Queen* (1999) 105 A Crim R 373.

<sup>141</sup> *Adams v Carr* (1987) 81 ALR 151.

all reasonable directions of that officer.<sup>142</sup> It is also proposed that the legislation remove the power to order any condition that is an independent sentencing option or that requires the offender to pay a monetary penalty, make restitution, pay compensation or comply with any other ancillary order.<sup>143</sup> The ALRC suggested that if the court determines

that a particular sentencing option is appropriate in light of the purposes, principles and factors of sentencing then it should impose that sentencing option in its own right and not as an adjunct to another sentencing option. It would introduce unnecessary complexity and inhibit transparency in sentencing to enable independent sentencing options to be attached as conditions of conditional release orders.<sup>144</sup>

The ALRC further considered that the power to require the offender to give security by way of recognizance should be repealed, suggesting that the provisions requiring forfeiture of money on breach have limited utility because the consequences of breach are already potentially serious.<sup>145</sup>

In 2005, the Australian Capital Territory passed ‘the most substantial review and rewrite of sentencing laws the territory has ever seen’.<sup>146</sup> Suspended sentences under the *Crimes (Sentencing) Act 2005* (ACT) are subject to a good behaviour bond which may contain one of a range of conditions, including community service, probation, participation in a rehabilitation program and ‘any other condition, not inconsistent with this Act or the *Crimes (Sentence Administration) Act 2005*, that the court considers appropriate’.<sup>147</sup> The Act lists the following as examples of possible conditions:

- that the offender undertake medical treatment and supervision (eg by taking medication and cooperating with medical assessments);
- that the offender supply samples of blood, breath, hair, saliva or urine for alcohol or drug testing if required by a corrections officer;
- that the offender attend educational, vocational, psychological, psychiatric or other programs or counselling;
- that the offender not drive a motor vehicle or consume alcohol or non-prescription drugs or medications;
- that the offender regularly attend alcohol or drug management programs.

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<sup>142</sup> ALRC, n 82, Rec 7-10. Conditions should however only be imposed if they are capable of being complied with, for example, medical treatment should only be ordered if it has been recommended by a qualified medical practitioner and is available to the offender: [7.97].

<sup>143</sup> *ibid*, Rec 7-11. Cf the TLRI’s proposal to remove the power to combine a suspended sentence with a community service, probation or program rehabilitation order, discussed at n 158 below.

<sup>144</sup> ALRC, *ibid*, [7.103].

<sup>145</sup> *ibid*, [7.112] and Rec 7-12.

<sup>146</sup> Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 3 August 2004, 3295 (John Stanhope, Chief Minister, Attorney-General, Minister for Environment and Minister for Community Affairs).

<sup>147</sup> *Crimes (Sentencing) Act 2005* (ACT), s 13. The legislation also contemplates complex combination orders. Section 29 provides that if an offence is punishable by imprisonment, the court may impose a combination sentence consisting of two or more of ten nominated kinds of order, including suspended sentences, fines, reparation, place restriction, non-association and treatment orders. There has not yet been any case law on the operation of these provisions, which came into effect on 2 June 2006.

While many of these are available in other jurisdictions, the example that an offender be required to supply blood samples would appear to go beyond anything else currently provided for in Australian legislation. The broad scope of these provisions doubtless addresses the criticism that a suspended sentence is a mere slap on the wrist. On the other hand, as with overly prescriptive bail conditions, there is a legitimate concern that imposing conditions which are too onerous or invasive sets an offender up for inevitable breach. As von Hirsch has noted,

the more different kinds of things the offender is called upon to do, the less likely it is that he or she will do them all. The individual whose transgression stems from difficulty in abiding by the normal rules of civil existence is not likely to abide by a plethora of new penal requirements.<sup>148</sup>

This concern is particularly great in respect of conditions that require the offender to abstain from drugs or alcohol or to participate in treatment for addiction to such substances. The principle of parsimony requires that an offender not be subject to a more severe sentence than is necessary to serve the interests of justice. Furthermore, there must also be certainty in the sentencing process. To this end, the principles set out in *Bugmy* above remain apposite.

In contrast to the approaches taken above, where the courts are either strictly constrained in the conditions and combinations available, or have detailed legislation setting out the range of orders they may make, the legislation in the Northern Territory and Tasmania currently leaves these issues essentially at large, although in both instances the case law has developed some limitations. In the Northern Territory, a sentence may be suspended ‘subject to such conditions as the court thinks fit’.<sup>149</sup> This has been held not to include a fine<sup>150</sup> or home detention.<sup>151</sup>

In Tasmania, the Act also allows for suspended sentences to be ‘subject to such conditions as the court considers necessary or expedient.’<sup>152</sup> In *Wighton v Taws*,<sup>153</sup> however, a condition requiring the offender to be admitted for treatment in an alcohol treatment program was criticised by Slicer J as running contrary to the spirit of certain provisions in the Act, ‘which requires participation in treatment as required by a public officer [and] pre-supposes that such treatment is available’. It was not for the offender to determine whether the relevant treatment facility was ‘able or agreeable to provide treatment’, and suspension should not be subject to a matter out of his control. The TLRI has recently made a draft recommendation that section 24 be amended to make explicit the kinds of conditions that can be attached to a

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<sup>148</sup> Andrew von Hirsch, *Censure and Sanctions*, Clarendon Press, Oxford (1993), 67.

<sup>149</sup> *Sentencing Act 1995* (NT), s 40.

<sup>150</sup> *O'Connor v Ryan* [2001] NTSC 112.

<sup>151</sup> *O'Brien v Quin* (2003) 13 NTLR 122. There is a separate power for the court to suspend a sentence ‘on the offender entering into a home detention order where it is satisfied that it is desirable to do so in the circumstances’: *Sentencing Act 1995* (NT), s 44.

<sup>152</sup> *Sentencing Act 1997* (Tas), s 24. For further discussion of the conditions on which suspended sentences are generally imposed, see [4.3.5].

<sup>153</sup> *Wighton v Taws* [2004] TASSC 21.

suspended sentence and that the list include supervision, community service, attendance at an offender treatment program or a restorative requirement.<sup>154</sup>

The Act presently also provides broad powers in respect of combination orders.<sup>155</sup> In *NLW and JGW*,<sup>156</sup> for example, the Court of Criminal Appeal declared that where ‘the scales are evenly balanced as to whether a term of imprisonment should be suspended, it may be appropriate to impose a fine coupled with a suspension of the term of imprisonment, rather than a sentence of imprisonment with immediate effect’. It has been held, however, that such a combination is not available in respect of assaults under the *Police Offences Act 1935* (Tas), which provides for a penalty ‘not exceeding 5 penalty units or to imprisonment for a term not exceeding 6 months’. Accordingly, the court may impose either a sentence of imprisonment (including a suspended sentence) *or* a fine, but not both.<sup>157</sup> The power to impose combination orders may be further restricted in the future in light of the TLRI’s view that ‘it is preferable to make additional punitive, rehabilitation or restorative requirements conditions of suspension’. Accordingly, it is proposed to amend section 8 ‘so that a suspended sentence cannot be combined with a community service order, a probation order or a rehabilitation program order so that a suspended sentence cannot be combined with a community service order, a probation order or a rehabilitation program order’,<sup>158</sup> although this approach is somewhat in conflict with the ALRC’s recommendations in respect of recognizance release orders discussed above.

### 2.2.5 Action on breach

The effect of a suspended sentence will clearly differ markedly depending on the law in relation to breaches – a mandatory cumulative activation provision will yield a very different effect on both the offender and the prison population than where the court is not so bound. As the discussion in Chapter 7 highlights, the extent to which breaches are prosecuted also significantly determines the effect of a suspended sentence.

The majority of jurisdictions have a presumption of activation on breach. In South Australia, for example, if an offender breaches a condition of his or her good behaviour bond, the court must activate the original sentence unless satisfied that the breach was trivial or there were good reasons for the offender failing to comply with the bond,<sup>159</sup> although the court has the power to reduce the term where there are

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<sup>154</sup> TLRI, n 88, 29.

<sup>155</sup> *Sentencing Act 1997* (Tas), s 8. See discussion in [4.3.4].

<sup>156</sup> *DPP (Tas) v NLW and JGW* [2004] TASSC 93, [18]. See also *Hamilton v The Queen* (Unreported, Cox CJ, Crawford and Slicer JJ, 2 April 1998) and *Pugh v White* [2003] TASSC 135. For discussion, see Warner, n 87, [11.429].

<sup>157</sup> *Rosevear v Bond* (2005) 15 Tas R 153 and *Mannie v Hibble* [2006] TASSC 55. Note that the South Australian Court of Criminal Appeal made a similar finding in *R v Selleck* (2000) 78 SASR 194.

<sup>158</sup> TLRI, n 88, 32. For further discussion on the use of combination orders, see [3.4.3], (Q9); [4.3.4] and [6.4.4].

<sup>159</sup> *Criminal Law (Sentencing) Act 1988* (SA), ss 58(1), (3).

special reasons for doing so.<sup>160</sup> In *Buckman*,<sup>161</sup> King CJ acknowledged the ‘clear legislative policy that in general a breach of a condition of a recognisance upon which a sentence has been suspended, should result in the offender serving the sentence which was suspended’, and went on to suggest that ‘[t]he court will not lightly interfere with the ordinary consequence of a breach of the recognisance’. His Honour added in *Marston*:

It is of great importance that the courts adhere to that principle. Departure from it by the non-revocation of suspended sentences tends to undermine the integrity of the system of suspended sentences and their effectiveness as a means of deterring future offenders.<sup>162</sup>

Notwithstanding these pronouncements, in *Huynh v Police*,<sup>163</sup> the offender’s depression was held to justify his failure to comply with the reporting condition of his bond, while in *Allen*,<sup>164</sup> the Crown did not dispute the finding that the difference in character between the crime for which the suspended sentence was imposed and the nature of the breaching offences amounted to proper grounds for not activating the sentence.

In NSW, the sentence is also to be activated unless the breach was trivial or there was good reason for the breach,<sup>165</sup> but unlike South Australia, the sentence is to be activated in full. The only power of the court at the time of re-sentencing is to order that the sentence may be served by way of home detention or periodic detention.<sup>166</sup> In *DPP (NSW) v Burrow*, Hidden J observed that:

Clearly, the legislature intended that a court should have much less room to move with a...[suspended sentence] bond than it has... with a [good behaviour] bond. Unless a significant breach of a [suspended sentence] bond normally leads to its revocation, the suspended sentence would be deprived of its salutary quality and of its viability as a sentencing option for serious offences.<sup>167</sup>

In the case of *Tolley*,<sup>168</sup> Howie J held that the originally imposed term takes effect upon revocation of the suspended sentence bond; there is therefore no power vesting in the judicial officer to impose a different sentence at that time.<sup>169</sup> His Honour was

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<sup>160</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 58(4). The court may order the sentence to be served cumulatively: s 58(4)(c). For discussion, see *Fox v Police* [2005] SASC 208.

<sup>161</sup> *R v Buckman* (1988) 47 SASR 303, 304.

<sup>162</sup> *Marston v The Queen* (1993) 60 SASR 320, 322. See also *R v Granger* (2004) 88 SASR 453.

<sup>163</sup> *Huynh v Police* [2003] SASC 414.

<sup>164</sup> *R v Allen* (2002) 81 SASR 434. See also *R v MacGregor* (2003) 138 A Crim R 361 and *R v Pham* [2003] SASC 386.

<sup>165</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 98(3). See *R v Cooke*; *Cooke v The Queen* [2007] NSWCCA 184 for discussion of what amounts to ‘good reason’. The NSW Sentencing Council has ‘recommended to the Attorney General that there should be a wider discretion to a Court in addressing a breach of a suspended sentence’: Sentencing Council, n 107, 51. To date, no action appears to have been taken on this issue.

<sup>166</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s 99(2).

<sup>167</sup> *DPP (NSW) v Burrow* [2004] NSWSC 433, [23].

<sup>168</sup> *R v Tolley* [2004] NSWCCA 165.

<sup>169</sup> See also *R v Hunt* [2002] NSWCCA 266; *R v Graham* (2004) 62 NSWLR 252; *Barrett v DPP (NSW)* [2006] NSWCCA 210; *Wise v The Queen* [2006] NSWCCA 264 and *Rickard v The Queen*

highly critical of the relevant provision, declaring it to be ‘incomprehensible both as to its meaning and the policy behind it’. The lack of discretion to reduce the term of the activated sentence to take into account any past compliance with the sentence clearly has the potential to lead to injustices where an offender breaches the sentence near the end of the operational period. These criticisms have now been resolved in part by recent amendments which allow the court to have regard to any served portion of a suspended sentence, when ordering a revoked sentence to be served by way of home or periodic detention.<sup>170</sup>

The provisions on breach in Western Australia,<sup>171</sup> Queensland<sup>172</sup> and the Northern Territory<sup>173</sup> are very similar, requiring the court to activate the suspended sentence unless it would be unjust to do so, taking into account all the circumstances that have arisen or become known since the suspended sentence was imposed. The court also has the power to order only part of the sentence to be served, and in the Northern Territory and Western Australia, may make no order.<sup>174</sup> In the recent case of *Western Australia v Cairns*<sup>175</sup> it was held that ‘the consequence of any further offending by a person serving such a sentence would be almost inevitable imprisonment’. In each of these jurisdictions, there is also a presumption that the activated sentence will be served concurrently with any other sentence served.<sup>176</sup> This approach has been criticised on the basis that although it may have been motivated by the worthy desire to reduce the risk of net-widening, it brings about the ‘bizarre consequences’ of a ‘wipe-out effect’.<sup>177</sup> In other words, the activated suspended sentence is effectively wiped out if the offender is ordered to serve a sentence of immediate imprisonment of the same duration concurrently with that sentence.

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[2007] NSWCCA 332. For discussion, see Nick Boyden, 'Butter Knives into Swords: Section 12 Bonds (Suspended Sentences) and their Revocation' (2005) (June) *Law Society Journal* 73.

<sup>170</sup> See *Crimes and Courts Legislation Amendment Act 2006* (NSW), 1.9[2], which came into effect on 29 November 2006. For discussion, see Laura Wells, 'Crimes and Courts Legislation Amendment Act 2006' (2006) 18 *Judicial Officers' Bulletin* 91.

<sup>171</sup> *Sentencing Act 1995* (WA), s 80, discussed in *Ripper v Blakey* [2002] WASCA 153, [7].

<sup>172</sup> *Penalties and Sentences Act 1992* (Qld), s 147(2), discussed in *R v Muller* [2006] 2 Qd R 126; *R v Allen* [2006] QCA 303; *R v Dracos* [2006] QCA 336; *R v Stevens* [2006] QCA 361; *R v Gill* [2006] QCA 506 and *R v Schluter* [2007] QCA 125.

<sup>173</sup> *Sentencing Act 1995* (NT), s 43, discussed in *Roper v Dore* [2000] NTCA 2. See also *R v Haji-Noor* [2007] NTCCA 7 as to the fixing of a non-parole period.

<sup>174</sup> *Sentencing Act 1995* (NT), s 43(5)(f); *Sentencing Act 1995* (WA), s 80(1)(d). In Western Australia, this must be accompanied by a fine.

<sup>175</sup> *Western Australia v Cairns* [2006] WASCA 178, [22].

<sup>176</sup> *Penalties and Sentences Act 1992* (Qld), s 155; *Sentencing Act 1995* (NT), s 43(6) and *Sentencing Act 1995* (WA), s 80(6). For appeals against accumulation of sentences in Queensland, see *R v Van Den Heuvel* [2006] QCA 177 and *R v Bravo* [2006] QCA 214. In Western Australia, see *Ngo v Western Australia* [2007] WASCA 221.

<sup>177</sup> Morgan (1996), n 98. Morgan also suggests that in Western Australia, the effect of this provision has become even more acute, with ‘sentence adjustment provisions’, designed to promote truth in sentencing, resulting in the possibility of having suspended sentences available for sentences which would previously have carried terms of up to 7½ years, but still with suspension of only two years: see Neil Morgan, 'The Abolition of Six-Month Sentences, New Hybrid Orders and Truth in Sentencing' (2004) 28 *Criminal Law Journal* 8, 20.



Victoria is unique in making breach of a suspended sentence a separate offence,<sup>178</sup> although it has long been recommended that this provision be repealed.<sup>179</sup> On breach, the court may order a fine and must order the offender to serve all or part of the original gaol term unless it is of the view that ‘it would be unjust to do so in view of any exceptional circumstances’<sup>180</sup> and there is a presumption that any activated sentence will be served cumulatively.<sup>181</sup> In *DPP (Vic) v Marell*,<sup>182</sup> Dodds-Streeton J held that ‘in the absence of a finding of exceptional circumstances, the terms of s 31(5A) mandate the restoration of the suspended sentence. Discretion, in that sense, is excluded.’ In the decision of *Stevens*,<sup>183</sup> Brooking JA suggested that judges needed to be ‘careful to ensure that the subsection is not treated as if it did not contain the adjective “exceptional” but simply spoke of circumstances’, while in *Kent v Wilson*, Hedigan J considered ‘exceptional circumstances’ to include:

the defendant being in a coma or suffering other serious illness, the defendant suffering loss of mental capacity, the destruction of a minimum or medium security prison by flood or earthquake so that the return of the defendant to a maximum security prison would be inappropriate. Mere changes in personal circumstances such as finding a job or accommodation would not amount to exceptional circumstances.<sup>184</sup>

The SAC recently published an analysis of the cases in the County Court where such circumstances have been held to exist,<sup>185</sup> suggesting that in each case it appeared to be the unique combination of factors, rather than the individual factors themselves, which led the court to its finding.<sup>186</sup> Submissions to the SAC adverted to the fact that the breach provisions are too inflexible, which was suggested to have ‘led to the practice by some judicial officers of finding “exceptional circumstances” where the offender’s circumstances are merely changed rather than exceptional’.<sup>187</sup>

The position in relation to breaches of Commonwealth recognizance release orders is somewhat complex. Section 20A(5)(c) of the *Crimes Act 1914* (Cth) provides that the court may impose a monetary penalty; extend the supervision period; revoke the

<sup>178</sup> *Sentencing Act 1991* (Vic), s 31(1). It is interesting to note that breach of the new CSI in Western Australia is also a separate offence, even though breach of a normal suspended sentence is not: see *Sentencing Act 1995* (WA), s 84J.

<sup>179</sup> See Freiberg, n 18, Rec 13 and SAC Final Report, n 42, Rec 14.

<sup>180</sup> *Sentencing Act 1991* (Vic), s 31(5), (5A). For discussion of whether these provisions may amount to a breach of Constitutional law, see Mirko Bagaric and Tanya Lakic, ‘Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after *Kable*’ (1999) 23 *Criminal Law Journal* 145.

<sup>181</sup> *Sentencing Act 1991* (Vic), s 31(6).

<sup>182</sup> *DPP (Vic) v Marell* (2005) 12 VR 581, [79].

<sup>183</sup> *R v Stevens* [1999] VSCA 173, [10].

<sup>184</sup> *Kent v Wilson* [2000] VSC 98. For discussion, see Richard Edney, ‘Exceptional Circumstances and the *Sentencing Act 1991*: An Emerging Jurisprudence’ (2001) 75(3) *Law Institute Journal* 50, 54 and Richard Edney, ‘Hard Time, Less Time: Prison Conditions and the Sentencing Process’ (2002) 26 *Criminal Law Journal* 139, 141. See also *R v Steggall* (2005) 157 A Crim R 402, where the Court held that ‘if an offender breaches a suspended sentence he or she shall be compelled to serve the whole of the sentence unless the circumstances are so exceptional as to be beyond reasonable contemplation or expectation’: [16].

<sup>185</sup> SAC DP, n 40, [4.51]-[4.58]. See also SAC Final Report, n 42, 21-25.

<sup>186</sup> SAC DP, *ibid.*, [4.58]. Exceptional circumstances were found in 43% of County Court cases.

<sup>187</sup> SAC Interim Report, n 95, [2.7]. See also *R v Bice* (2000) 2 VR 364 and Freiberg, n 18, Rec 17.

order and impose an alternative sentencing option under section 20AB; revoke the order and imprison the offender for the unserved portion of the sentence; or take no action.<sup>188</sup> In *Kay v Hickey*,<sup>189</sup> Blow J commented on the fact that there does not appear to be any scope for substituting a shorter sentence of imprisonment or ordering only part of the outstanding portion of the sentence to be served.<sup>190</sup> Submissions to the ALRC's review also criticised the lack of flexibility in relation to breaches. The ALRC has responded to this criticism by recommending that courts be empowered to deal with any breach of a sentencing order, regardless of whether the offender has a reasonable excuse for the breach,<sup>191</sup> and has further suggested an amendment which would allow a court to vary an order or impose a lesser period of imprisonment than that originally imposed.<sup>192</sup>

In all of the jurisdictions discussed above, the court's discretion in relation to breaches is legislatively or judicially constrained. In the ACT and Tasmania, by contrast, the courts currently have full discretion in the event of breach, although my discussion in Chapter 3 suggests a *de facto* presumption in favour of activation.<sup>193</sup> The TLRI has recently made a draft recommendation that there be a statutory presumption in favour of activation in Tasmania, arguing that:

while the certainty of detection is more important than the severity of the punishment for breach, it is nevertheless important that there is a need to clearly communicate to offenders and to the community that breaches will be dealt with seriously if the order is to have integrity and not be regarded as a let-off with no serious consequences.<sup>194</sup>

If adopted, this approach would bring Tasmania into line with most of the other Australian jurisdictions, although my discussion in Chapter 7 indicates that any legislative amendment will have minimal effect in the absence of a more rigorous approach to the prosecution of breaches.

### 2.2.6 Partly suspended sentences

Partly suspended sentences are available in every jurisdiction except Western Australia and NSW. Although they have been unavailable in Western Australia since the passage of the *Sentencing Act 1995*, which introduced wholly suspended sentences, the position was not initially clear in respect of NSW. When the power to impose a suspended sentence was introduced in 2000, some commentators suggested

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<sup>188</sup> Interestingly, the court does not have any power to act where the offender has a reasonable excuse for the breach, such as illness, an issue which rose to prominence in the context of the late stockbroker Rene Rivkin: see *R v Rivkin* (2003) 198 ALR 400.

<sup>189</sup> *Kay v Hickey* [2002] TASSC 108.

<sup>190</sup> Note that this decision was not followed in *Sweeney v Corporate Security Group* (2003) 86 SASR 425, where Perry J of the South Australian Supreme Court found that the principles Blow J applied, which were taken from cases dealing with the South Australian legislation, were not necessarily appropriate in the context of s 20A(5) *Crimes Act 1914* (Cth). See also *Ferenczy v DPP (Cth)* [2004] SASC 208.

<sup>191</sup> ALRC, n 82, Rec 17-1.

<sup>192</sup> *ibid*, Rec 17-2.

<sup>193</sup> See [3.4.6], (Q16) for further discussion.

<sup>194</sup> TLRI, n 88, 31.

that partly suspended sentences were not available.<sup>195</sup> One of the policy makers involved in drafting the legislation suggested that the justification for the absence of partly suspended sentences was that there would otherwise be shorter sentences of imprisonment ordered with longer supervision periods, undermining the intent of s 44(2) of the *CSPA*, which preserved a 3:1 ratio between the non-parole and parole periods of a sentence in the absence of special circumstances.<sup>196</sup>

This legislative intention was temporarily stymied by the Court of Criminal Appeal, which held by majority in *Gamgee*<sup>197</sup> that it was permissible to partly suspend both the initial and later portions of a sentence, suggesting that in addition to suspending a portion of the sentence after a period in custody, as occurs in Tasmania and elsewhere in Australia, it would also be possible to order suspension of an initial portion of the term of imprisonment, ‘to enable some event to take place (eg a pregnancy or a course of study)’.<sup>198</sup> However the ability to partly suspend a sentence of imprisonment was considered by the Government to be undesirable, on the ground that such sentences would be difficult to administer if ordered to be served following an initial period of suspension, and could cause hardship to an offender.<sup>199</sup> Partly suspended sentences were therefore removed by the *Crimes Legislation Amendment Act 2003*, but there have since been proposals to reinstate them.<sup>200</sup>

Partly suspended sentences are a fairly recent phenomenon in South Australia, having only been introduced in 1999. They are available in respect of sentences of between three and 12 months’ duration, and the portion to be served in custody must be at least one month.<sup>201</sup> It was held in *Carusi v Police*<sup>202</sup> that it is a sentencing error for the court to overlook this provision in a case in which it could be applied, although it has also been stated that the failure to consider it expressly was not a basis for interfering with a sentence.<sup>203</sup>

Partly suspended sentences are currently available in Victoria, but the SAC recommended in its Interim Report that they be abolished and replaced by an ‘imprisonment release order’, which would consist of a maximum term of imprisonment of 12 months. The remainder of the sentence would be served in the community on core general conditions, with or without special or intensive

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<sup>195</sup> Warner, n 94, 361.

<sup>196</sup> Haesler, n 94.

<sup>197</sup> *R v Gamgee* (2001) 51 NSWLR 707.

<sup>198</sup> *ibid*, [14] (Mason P and Dowd J).

<sup>199</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 25 June 2003, 2039 (John Hatzistergos, Minister for Justice, and Minister Assisting the Premier on Citizenship), 2041. These criticisms could be overcome if the suspended portion of the sentence were to commence only after the unsuspended portion had been served, as is the case in other jurisdictions, including Tasmania.

<sup>200</sup> See Sentencing Council, *Abolishing Prison Sentences of Six Months or Less: Discussion Paper*, Sydney (2004), 26 and LCSCLJ, n 106, Rec 24.

<sup>201</sup> *Criminal Law (Sentencing) Act 1988* (SA), s 38(2a).

<sup>202</sup> *Carusi v Police* [2002] SASC 240.

<sup>203</sup> *Peart v Police* (2003) 229 LSJS 194.

conditions attached.<sup>204</sup> Part 1 of the Final Report, which advocated phasing out wholly suspended sentences by 2009, did not address this proposal further and it remains to be seen whether Part 2, which is due to be released in 2008, will build on the interim recommendation for the abolition of partly suspended sentences.

## 2.3 England

### 2.3.1 Introduction of suspended sentences

Suspended sentences were introduced in England in 1967 and their popularity and use has waxed and waned ever since.<sup>205</sup> When the proposal to introduce suspended sentences was first considered by the Advisory Council on the Treatment of Offenders, it declared that:

to justify any new form of penal treatment there must be strong reasons to show that the suggested innovation would be likely to be a positive improvement on existing methods. The Council have been unable to find any such strong reasons. They think, moreover, that there are difficulties in the principle of the suspended sentence which make it positively undesirable for this form of treatment to be introduced into English law.<sup>206</sup>

The Council concluded that '[t]he suspended sentence is wrong in principle and to a large extent impracticable. It should not be adopted, either in conjunction with probation or otherwise.'<sup>207</sup> Notwithstanding this opposition, suspended sentences were introduced by the *Criminal Justice Act 1967*, which provided that any term of imprisonment of up to two years could be suspended, with mandatory suspension of sentences of up to six months unless certain exceptions applied.<sup>208</sup> Partly suspended sentences were introduced under the *Criminal Justice Act 1977*, but they did not become operational until 1982 and were abolished by the *Criminal Justice Act 1991*.

Harding and Koffman suggest that:

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<sup>204</sup> SAC Interim Report, n 95, [4.2]. This proposal would also apply to community custody and treatment orders and community based orders combined with short terms of imprisonment.

<sup>205</sup> For background, see Advisory Council on the Penal System, n 118; Michael Sherlock, 'The Suspended Sentence: What Has Gone Wrong?' (1970) 120(2) *New Law Journal* 1144; Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties*, Home Office, London (1978); R Paul Davis, 'Politics and the Suspended Sentence' (1978) 128 *New Law Journal* 1020; David Thomas, *Principles of Sentencing*, Heinemann, London (2nd ed, 1979); James Dignan, 'The Sword of Damocles and the Clang of the Prison Gates: Prospects on the Inception of the Partly Suspended Sentence' (1984) 23(3) *Howard Journal of Criminal Justice* 183; David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study 103, London (1988); Andrew Ashworth, *Custody Reconsidered: Clarity and Consistency in Sentencing*, Home Office, London (1989); Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Punishment*, Hart Publishing, Oxford (2nd ed, 1998) and Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (3rd ed, 2000).

<sup>206</sup> Advisory Council on the Treatment of Offenders, *Suspended Sentence*, Home Office, London (1952), [9].

<sup>207</sup> *ibid*, [23](d). This position was still held by the Council in 1957: Advisory Council on the Treatment of Offenders, *Alternatives to Short Terms of Imprisonment*, Home Office, London (1957), [27]; [61].

<sup>208</sup> Exceptions included certain personal violence, sexual or firearms offences and cases where the offender was on probation or conditional discharge or had previously received a custodial sentence (including a suspended sentence).

the purpose behind the introduction of the suspended sentence was not conveyed to sentencers with sufficient clarity. It was introduced largely out of political expediency, due to fears about the rising prison population, and defended by vague, and potentially misleading references to its supposed deterrent value.<sup>209</sup>

The courts embraced wholly suspended sentences with gusto; indeed, Ashworth considered that they were ‘too willing to do so’,<sup>210</sup> while Sparks argued that in cases where the courts want to look tough, ‘as a matter of judicial psychology, the measure must often have been virtually irresistible’.<sup>211</sup> In order to discourage their excessive use, the Court of Appeal stated in *O’Keefe*<sup>212</sup> that a court should not consider a suspended sentence unless the case was serious enough for a sentence of immediate imprisonment.<sup>213</sup> This process was described as ‘quite a difficult feat’,<sup>214</sup> requiring ‘a certain amount of mental gymnastics’<sup>215</sup> and in any event appeared to be unsuccessful in its attempt to curb the use of suspended sentences.<sup>216</sup> Bottoms accordingly observed in 1981 that the measure had ‘quickly established itself and now occupies a major position in the English penal system’.<sup>217</sup>

### 2.3.2 Restricting the use of suspended sentences

The 1990 White Paper, *Crime, Justice and Protecting the Public*, argued that ‘[m]any offenders see a suspended sentence as being a “let-off” since it places no restrictions other than the obligation not to offend again’.<sup>218</sup> Shortly thereafter, the legislation was amended to restrict the ability to suspend to sentences of up to two years where there were ‘exceptional circumstances’.<sup>219</sup> The Court of Appeal held in

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<sup>209</sup> Richard Harding and Laurence Koffman, *Sentencing and the Penal System*, Sweet & Maxwell, London (2nd ed, 1995), 275-6. See also Marc Ancel, *Suspended Sentence*, Heinemann, London (1971), Foreword by Sir Leon Radzinowicz, vi and Roger Hood, ‘Criminology and Penal Change: A Case Study of the Nature and Impact of Some Recent Advice to Governments’ in Roger Hood (ed), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz*, Heinemann, London (1974) 375, 384.

<sup>210</sup> Ashworth, n 205, 293. See also Thomas, n 205, 244. In 1968-70, suspended sentences accounted for 20% of all sentences imposed on men in the higher courts, and 16% in the lower courts.

<sup>211</sup> Richard Sparks, ‘The Use of Suspended Sentences’ [1971] *Criminal Law Review* 384, 399.

<sup>212</sup> *R v O’Keefe* [1969] 1 All ER 426, endorsed by the High Court in *Dinsdale*, n 4. In *R v English* [1984] Crim LR 370, it was held that the suspended sentence must be treated as a sentence of imprisonment and is not to be regarded as a conditional discharge with teeth.

<sup>213</sup> This proviso was legislated for in the *Criminal Justice Act 1972*, which also removed the mandatory suspension provision for sentences of up to six months, reduced the maximum operational period from three to two years and introduced the suspended sentence supervision order.

<sup>214</sup> Nigel Walker, *Sentencing: Theory, Law and Practice*, Butterworths, London (1985), [9.26].

<sup>215</sup> Eric Stockdale and Keith Devlin, *Sentencing*, Waterlow Publishers, London (1987), [9.23].

<sup>216</sup> Roger Tarling and Mollie Weatheritt, *Sentencing Practice in Magistrates’ Courts*, Great Britain Home Office Research Unit (1979); Bottoms, n 119, 5 and Harding and Koffman, n 209, 277.

<sup>217</sup> Bottoms, *ibid*, 1. In 1990, suspended sentences accounted for 34% of sentences imposed on men in the Crown Court and 49% in the Magistrates’ Court. The figures for women were even higher: 55% in the Crown Court and 66% in the Magistrates’ Court: Nigel Walker, *Aggravation, Mitigation and Mercy in Criminal Justice*, Blackstone Press, London (1999), 100.

<sup>218</sup> United Kingdom, *Crime, Justice and Protecting the Public*, White Paper (Cm 965), HMSO, London (1990), [3.20]-[3.23]. The White Paper also recommended that a fine or compensation order be attached to a suspended sentence.

<sup>219</sup> *Criminal Justice Act 1991* (UK), s 5.

*Okinikan*<sup>220</sup> that 'taken on their own, or in combination, good character, youth and an early plea are not exceptional circumstances justifying a suspended sentence. They are common features of many cases'. Lord Chief Justice Taylor also observed in *Robinson*<sup>221</sup> that instances in which 'a suspended sentence will be considered appropriate are few and far between.' In 1993, it was reported that 'for all practical purposes, the suspended sentence has been abolished except for a tiny number of extraordinary cases'<sup>222</sup> and by 2001, it was described as being 'effectively on life support'.<sup>223</sup>

### 2.3.3 Reinvigorating the suspended sentence

The exceptional circumstances provision was retained in the *Powers of Criminal Courts (Sentencing) Act 2000*,<sup>224</sup> but this was followed shortly thereafter by the Halliday Report,<sup>225</sup> which examined the possibility of creating a new form of suspended sentence combined with a community sentence.<sup>226</sup> Soon thereafter, the Government released its *Justice for All* White Paper,<sup>227</sup> and proposed, *inter alia*, the introduction of a new form of suspended sentence, 'Custody Minus', which would give sentencers the power 'to put an offender into custody and suspend the sentence for up to two years on condition that the offender undertakes a demanding program of activity in the community.'<sup>228</sup> The exceptional circumstances component would be

<sup>220</sup> *R v Okinikan* [1993] 2 All ER 5. See also *Re Lowery* [1992] 14 Cr App R (S) 485; *R v Cameron* [1993] Crim LR 721; *R v French* [1993] Crim LR 893; *R v Ullah Khan* [1993] Crim LR 982; *R v Bradley* [1994] Crim LR 381; *Re Brookin* (1994) 16 Cr App R (S) 78; *R v Weston* [1995] Crim LR 900 and *Re Smith* [2002] 1 Cr App R (S) 258. For discussion, see David Foot, 'The Use of Suspended Sentences' (1993) 157 *Justice of the Peace* 565; David Thomas, 'Commentary' [1993] *Criminal Law Review* 982; David Thomas, 'Commentary' [1993] *Criminal Law Review* 224; Nigel Stone, 'The Suspended Sentence since the *Criminal Justice Act 1991*' [1994] *Criminal Law Review* 399; J Q Campbell, 'A Sentencer's Lament on the Imminent Death of the Suspended Sentence' [1995] *Criminal Law Review* 293; David Thomas, 'Commentary' [1996] *Criminal Law Review* 279; Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the mid-1990s*, Home Office Research Study 180, London (1998), 31-33; David Thomas, 'Commentary' [1998] *Criminal Law Review* 515; Martin Wasik, 'The Suspended Sentence: "Exceptional Circumstances"' (1998) 162 *Justice of the Peace* 176; Walker, n 214 and Ian McLean, Peter Morrish and John Greenhill, *Magistrates' Court Index*, Oxford University Press, Oxford (13th ed, 2003), 177-8.

<sup>221</sup> *R v Robinson* [1993] 2 All ER 1, 3.

<sup>222</sup> 'Comment: Goodbye to the Bender', *Sentencing News*, Issue 2, 27 April 1993.

<sup>223</sup> Julian Roberts, 'Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales' (2003) 42 *Howard Journal of Criminal Justice* 229, 232 and Roberts, n 116, 86. See also Walker, n 214, 100 and Ashworth, n 205, with Ashworth reporting that the use of suspended sentences had dropped from 10% to 1% for men and from 8% to 2% for women: 295.

<sup>224</sup> *Powers of Criminal Courts (Sentencing) Act 2000*, s 118(4)(b).

<sup>225</sup> Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, London (2001) (Halliday Report). For comment, see Neil Hutton, 'Making Punishments Work?' (2001) 34(July) *Socio-Legal Newsletter* 1; Tonry and Rex, n 119 and Roberts, n 116, 85-87. The Halliday Report also found there was no reason for removing the current restrictions on the use of suspended sentences: [0.16].

<sup>226</sup> Halliday Report, *ibid*, [5.17].

<sup>227</sup> United Kingdom, *Justice for All*, White Paper (Cm 5563) (2002) (*Justice for All*). For commentary, see Julian Roberts, 'Alchemy in Sentencing: An Analysis of Sentencing Reform Proposals in England and Wales' (2002) 4 *Punishment and Society* 425.

<sup>228</sup> *Justice for All*, *ibid*, [5.30].

removed, with the intention that Custody Minus would be ‘available for a wide range of offenders’.<sup>229</sup>

The proposals were introduced by the *Criminal Justice Act 2003* and the new suspended sentence became available from 4 April 2005.<sup>230</sup> Under the new provisions, a court passing a sentence of imprisonment of at least 28 weeks but not more than 51 weeks may order the offender to comply with a broad range of specified requirements.<sup>231</sup> In the event of breach, the court may order the original sentence or a lesser term to take effect; amend the order by imposing more onerous conditions; or extend the supervision or operational period.<sup>232</sup> The court is required to make an order, ‘unless it is of the opinion that it would be unjust to do so in view of all the circumstances’.<sup>233</sup>

The new measure has been endorsed as a positive step by the Lord Chief Justice<sup>234</sup> and the General Council of the Bar of England and Wales,<sup>235</sup> but there is some

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<sup>229</sup> *ibid*, [5.31]. It was also proposed to introduce review courts empowered to order the offender to appear before them to have the sentence amended; this ‘might result in a toughening up of the conditions if the offender was showing signs of failure, immediate imprisonment in the event of failure, or a less onerous sentence if there was good progress’: [5.32].

<sup>230</sup> The legislation also introduced ‘Custody Plus’, which will replace all sentences of less than 12 months with a short custodial sentence followed by a period of supervision, during which the offender will be required to fulfill one or more requirements. It is interesting to note that a suspended sentence will not always be more lenient than one of ‘custody plus’, as it could be longer and more punitive in its effect.

For discussion, see Sentencing Guidelines Council, *New Sentences: Criminal Justice Act 2003* (2004), [http://www.sentencing-guidelines.gov.uk/docs/New\\_sentences\\_guideline1.pdf](http://www.sentencing-guidelines.gov.uk/docs/New_sentences_guideline1.pdf), Section 2, Part 2 and Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (4th ed, 2005), [9.4.2]; [10.6.3]. For discussion in respect of female offenders, see Elaine Player, ‘The Reduction of Women’s Imprisonment in England and Wales: Will the Reform of Short Prison Sentences Help?’ (2005) 7 *Punishment and Society* 419, 430. Although the new suspended sentence order is sometimes still referred to as ‘custody minus’ in the literature, this term is not used in the legislation. For a critique of the term ‘custody minus’, see Roberts, n 212, 232-3.

<sup>231</sup> Pursuant to ss 190 and 199-213, the requirements which can be imposed include: unpaid work; an activity, for example, contact between offenders and victims; participation in a program designed to address offending behaviour; prohibition from, for example, contacting another person; curfew; exclusion, prohibiting the offender from entering a specified place; residence; mental health, drug rehabilitation or alcohol treatment; supervision and/or electronic monitoring. Offenders under 25 may also be subject to an attendance centre requirement. For comment on these requirements, see Ashworth, *ibid*, [10.6.3]. Note that subsection (5) provides that before imposing two or more different requirements, the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.

<sup>232</sup> *Criminal Justice Act 2003* (UK), Schedule 12, s 8(2).

<sup>233</sup> *Criminal Justice Act 2003* (UK), Schedule 12, s 8(3). The legislation specifically refers to any past compliance and the facts of any subsequent offence as matters to be taken into consideration: subsection (4).

<sup>234</sup> See Evidence to Home Affairs Committee Sentencing Guidelines, Parliament of the United Kingdom, London, 1 July 2004 (Lord Chief Justice Woolf).

<sup>235</sup> Select Committee on Home Affairs, Parliament of the United Kingdom, *Memorandum submitted by the General Council of the Bar of England and Wales* (CJSB 20), London, 22 November 2002, <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/83/83ap01.htm>, Appendix 6. Cf the Magistrates’ Association, which ‘is not in favour of “custody minus” for failure to complete a community order. It should be for the court to decide what happens to the offender after a breach has occurred and it is in the interests of justice that a court hearing takes place with the offender legally represented’: Magistrates’ Association, *Response to Consultation on Sentencing Reform* (2001), [http://www.magistrates-association.org.uk/documents/sentencing/sentencing\\_reform.doc](http://www.magistrates-association.org.uk/documents/sentencing/sentencing_reform.doc), [14].

concern that it will lead to an increase the prison population.<sup>236</sup> In particular, it has been suggested that ‘although far fewer minor offenders would be sent to prison “through the front door” by the courts, they might well end up there “by the back door” for breaching the terms of their new community punishment orders or “custody minus” sentences.’<sup>237</sup> There is also the risk that ‘so-called “sanction stacking”...will greatly increase the risk of breach, while also allowing less leeway for the choice of appropriate, constructive penalties before an offender risks custody’.<sup>238</sup> Furthermore, the failure to link suspended sentences to the purpose and principles of sentencing, including proportionality, may undermine its effectiveness in reducing the number of admissions to custody, with the effect that ‘the new measures will almost inevitably drive the prison population to new heights’.<sup>239</sup>

The Sentencing Guidelines Council has recommended that when determining whether to impose a suspended sentence, the court must ask three questions, namely ‘(a) has the custody threshold been passed? (b) if so, is it unavoidable that a custodial sentence be imposed? [and] (c) if so, can that sentence be suspended?’<sup>240</sup> Ashworth queries whether ‘this reiteration will be sufficient to prevent a return to the pre-1991 practice, whereby suspended sentences were often imposed on people who would not otherwise have been sentenced to imprisonment’, suggesting that ‘the logic may be thought imperfect’.<sup>241</sup> Nevertheless, he holds out hope for the ‘possibility of taking out of prison a fair number of offenders who might otherwise have been sent there’. Mair, Cross and Taylor describe the new suspended sentence as ‘playing a significant role in sentencing’,<sup>242</sup> although they already consider suspended sentences ‘to be

<sup>236</sup> The projected net effect on the prison population of the implementation of all the sentencing provisions contained in the *Criminal Justice Act 2003* is an increase of about 1,000 by 2009; this is then expected to reduce to a long-term increase of about 500: United Kingdom, *Parliamentary Debates*, House of Commons, Written Answers, 13 November 2003, [136255] (Paul Goggins, Minister for Prisons and Probation). It is not possible to accurately predict the impact of the suspended sentence provisions. See also Tim Newburn, *Crime and Criminal Justice Policy*, Pearson Education, Harlow (2nd ed, 2003), 49 and Jenny Roberts and Michael Smith, ‘Custody Plus, Custody Minus’ in Michael Tonry (ed), *Confronting Crime: Crime Control Policy under New Labour*, Willan Publishing, Cullompton (2003) 227.

<sup>237</sup> Alan Travis, ‘Prison numbers could rise by 9,500’, *Society Guardian*, 6 July 2001, <http://society.guardian.co.uk/crimeandpunishment/story/0,8150,517686,00.html>.

<sup>238</sup> United Kingdom, *Parliamentary Debates*, House of Lords, Written Answers, 16 June 2003, Column 584 (Baroness Linklater of Butterstone).

<sup>239</sup> Michael Cavadino and James Dignan, *The Penal System: An Introduction*, Sage Publications, London (3rd ed, 2002), 154-5. See also Roberts, n 116, 88.

<sup>240</sup> Sentencing Guidelines Council, n 230, [2.2.11]. The Council added that sentencers should be clear that they would have imposed a custodial sentence if the power to suspend had not been available. The Council also suggested that before ‘making the decision to suspend sentence, the court must already have decided that a prison sentence is justified and should also have decided the length of sentence that would be the shortest term commensurate with the seriousness of the offence if it were to be imposed immediately. The decision to suspend the sentence should not lead to a longer term being imposed than if the sentence were to take effect immediately’: [2.2.12]. For discussion of the appropriateness of increasing the term of a sentence to reflect the fact that it has been suspended, see discussion in [3.4.2], (Q13).

<sup>241</sup> Ashworth, n 230, [9.4.2].

<sup>242</sup> George Mair, Noel Cross and Stuart Taylor, *The Use and Impact of the Community Order and Suspended Sentence Order*, Community Sentence Series, Centre for Crime and Justice Studies, London (2007), 7.



overused'.<sup>243</sup> To date, their data do not reveal evidence of sanction-stacking, with figures for July 2006 indicating that 63% of suspended sentence orders have one or two requirements,<sup>244</sup> but they caution:

Sentencers, especially magistrates, tend to believe that more is almost certainly better, and the scope for adding an excessive number of requirements to a...Suspended Sentence Order seems to be considerable...Indeed, previous research has demonstrated that, when faced with the power to add conditions to sentences, magistrates will take the opportunity. Should this occur, offenders would be likely to fail to comply with their requirements and custody could result, thus contributing to the already overcrowded prison population.<sup>245</sup>

The Criminal Justice and Immigration Bill was recently introduced to Parliament, proposing, *inter alia*, to remove the power to impose suspended sentence orders for summary offences,<sup>246</sup> thereby initiating yet another phase in England's the use of suspended sentences.

### 2.4 New Zealand

Suspended sentences were introduced in New Zealand by the *Criminal Justice Amendment Act 1993* (NZ),<sup>247</sup> which provided that prison sentences of between six months and two years could be suspended for up to two years.<sup>248</sup> The suspended sentence could be breached by the offender committing an imprisonable offence during the operational period, in which case the court was required to activate the sentence in full unless of the opinion that it would be unjust to do so.<sup>249</sup>

Research by the Ministry of Justice ultimately indicated that suspended sentences had in fact caused an increase in prison numbers,<sup>250</sup> leading the Justice Deputy Secretary to declare 'Suspended sentences of imprisonment are being abolished because they have failed to achieve their intended purposes. They do not act as a greater deterrent than either prison or community-based sanctions...Where

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<sup>243</sup> *ibid*, 31.

<sup>244</sup> *ibid*, 18-19. It would seem however that the suspended sentence is being used as a more punitive order than the community sentence, in spite of advice to the contrary by the Sentencing Guidelines Council, n 219.

<sup>245</sup> *ibid*, 13-14. References omitted.

<sup>246</sup> See Criminal Justice and Immigration Bill (2007), which was in Committee in the House of Lords as at 6 February 2008. For information on the Bill's progress, see <http://services.parliament.uk/bills/>.

<sup>247</sup> For background discussion, see Brigit Laidler, 'Activating the Suspended Sentence: The Sword's Descent' (1995) 16 *New Zealand Universities Law Review* 379; Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1989 to 1997*, Ministry of Justice, Wellington (1998); Wendy Searle, Judy Paulin and Tony Waldegrave, 'The Activation of Suspended Sentences of Imprisonment in New Zealand' in Philip Spier (ed), *Conviction and Sentencing of Offenders in New Zealand 1989 to 1997*, Ministry of Justice, Wellington (1998) and Sue Triggs, *Sentencing in New Zealand: A Statistical Analysis*, Ministry of Justice, Wellington (1999).

<sup>248</sup> *Criminal Justice Act 1985* (NZ), s 21A(1).

<sup>249</sup> In such circumstances, the court could impose a shorter sentence, cancel the suspended sentence and impose a non-custodial order or simply cancel the suspended sentence. Following amendments in 1998, the court also had the power to leave the suspended sentence in force and make no order.

<sup>250</sup> For discussion, see [1.4.5].

immediate custody is appropriate, that is what judges should impose'.<sup>251</sup> Suspended sentences were abolished in June 2002 by the *Sentencing and Parole Reform Act 2002* (NZ),<sup>252</sup> in the expectation that this would result in a reduction of prison numbers.<sup>253</sup> Unfortunately, the reality once again did not match the policy expectation. Research indicates that in the year following the abolition of suspended sentences, custodial sentences increased by 8%. Other factors doubtless played a role in this outcome, but it has been suggested that it was 'likely that the abolition of suspended sentences contributed to the higher number of prison sentences imposed in 2003'.<sup>254</sup> Thus, although the decision to abolish suspended sentences in New Zealand was based on the ideal combination of good policy and sound empirical research, the somewhat disappointing outcome should sound a note of caution for jurisdictions seeking to abolish an established sentencing disposition.

## 2.5 Canada

### 2.5.1 Introduction of conditional sentences

As discussed in Chapter 1, a suspended sentence in Canada differs significantly from the kind of suspended sentences discussed in this thesis, in that it is the passing of the sentence which is suspended, not its execution, and the offender is released on conditions as prescribed in a probation order.<sup>255</sup> In 1996, a new order was introduced in Canada, the conditional sentence,<sup>256</sup> where the sentence is served in the community. In the event of breach, only the unexpired portion of the sentence (or a part thereof) can be ordered to be served.<sup>257</sup> Conditional sentences are currently

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<sup>251</sup> Young, Warren, "'World First' For Restorative Justice', *Te Ara Whakatika* (2002), <http://www.justice.govt.nz/pubs/newsletter/tearawhakatika/issue-9.html>.

<sup>252</sup> For discussion, see Geoff Hall, 'The Sentencing Act 2002 - New Bottle, Same Wine?' (2002) 583(June) *Law Talk* 20 and Julian Roberts, 'Sentencing Reform in New Zealand: An Analysis of the *Sentencing Act 2002* (NZ)' (2003) 36 *Australian and New Zealand Journal of Criminology* 249. When considering the proposal to abolish suspended sentences, the Justice and Electoral Matters Select Committee concluded that suspended sentences had failed to achieve their intended objectives of reducing the prison population and providing a deterrent. A majority considered that the positive benefits of suspended sentences could be achieved by alternative measures such as home detention, community sentences and adjournments: Justice and Electoral Committee, Parliament of New Zealand, *Commentary: Sentencing and Parole Reform Bill*, Wellington (2002), 25.

<sup>253</sup> Ministry of Justice, *Sentencing Act 2002 and Parole Act 2002: Reforming the Criminal Justice System*, Wellington (2002), <http://www.justice.govt.nz/pubs/other/pamphlets/2002/sentence-parole-2002/sentence.pdf>, 11.

<sup>254</sup> Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003*, Ministry of Justice, Wellington (2004), [4.2].

<sup>255</sup> *Criminal Code* RSC 1985, c 46 (Can), s 731. The most comparable sentence under the *Sentencing Act 1997* (Tas) is s 7(f), which provides that the court may 'with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender'.

<sup>256</sup> *Criminal Code* RSC 1985, c 46 (Can), s 742. For discussion of the differences between the Canadian suspended and conditional sentence, see Robin MacKay, *Conditional Sentences*, Report PRB 05-44E, Parliamentary Information and Research Service, Canada (2005). See also Department of Justice Canada, *What is a Conditional Sentence?: Fact Sheet #1* (2001) [http://www.justice.gc.ca/en/ps/rs/rep/qa/cs\\_1.pdf](http://www.justice.gc.ca/en/ps/rs/rep/qa/cs_1.pdf) and Roberts, n 116, Foreword by Andrew Ashworth, x.

<sup>257</sup> *Criminal Code* RSC 1985, c 46 (Can), s 742.6(9)(c)(i) and (9)(d) The court can also take no action, change the optional conditions, or order that the conditional sentence order resume on the offender's

available for offences that do not carry a minimum penalty and for sentences of up to two years minus one day, but their availability has recently been restricted by Bill C-9, which was to come into effect in January 2008, and precludes the imposition of such sentences for terrorism offences; offences for the benefit of, at the direction of, or in association with a criminal organization; and serious personal injury offences punishable by a maximum sentence of 10 years or more and prosecuted by indictment.<sup>258</sup>

The court must be satisfied that the presence of the offender in the community does not pose a danger to the public and that a conditional sentence would be consistent with the purpose and principles of sentencing contained in the *Criminal Code*.<sup>259</sup> In addition to core conditions,<sup>260</sup> the court may also order optional conditions requiring the offender to: abstain from alcohol or drugs, or owning or carrying a weapon; provide for the support or care of dependants; perform community service; attend a treatment program; or comply with other reasonable conditions which the court 'considers desirable for securing good conduct and preventing reoffending'.<sup>261</sup> On breach, the court may activate the unexpired portion of the sentence in whole or part, amend the optional conditions or take no action.

Freiberg has observed that the conditional sentence 'has proved to be as controversial and popular in Canada as it has been elsewhere'.<sup>262</sup> In particular, there has been criticism of the two-step process laid down by the *Criminal Code*, similar to that outlined in *Dinsdale*, with Roberts suggesting that it 'contains features that stretch the credibility of conditional sentencing to the breaking point'.<sup>263</sup> Gemmell has described this as 'a kind of penological paradox for the sentencing judge, adding that '[t]he decision to impose a conditional sentence is almost a kind of *reductio ad absurdum* of the original decision that called for imprisonment'.<sup>264</sup>

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release from custody. A similar approach is taken in respect of intensive corrections orders in Victoria: see *Sentencing Act 1991* (Vic), s 26(3A)(c).

<sup>258</sup> See Department of Justice Canada, *Background, Bill C-9 - Conditional Sentences*, 31 May 2007, [http://www.justice.gc.ca/en/news/nr/2007/doc\\_32025.html](http://www.justice.gc.ca/en/news/nr/2007/doc_32025.html). For comment on an earlier version of the Bill, see Julian Roberts, 'Reforming Conditional Sentencing: Evaluating Recent Legislative Proposals' (2006) 52 *Criminal Law Quarterly* 18. Roberts suggests that the statutory maximum penalty and the prosecutorial discretion to proceed by indictment are 'highly questionable measures of seriousness': 21.

<sup>259</sup> The Supreme Court also held in *R v Fice* [2005] 1 SCR 742 that a conditional sentence is not available to an offender who otherwise deserves penitentiary time – that is, an unsuspended sentence – just because the offender has spent time in custody before being sentenced.

<sup>260</sup> The core conditions require the offender to be of good behaviour, appear before the court when required, report to a supervisor, remain within the jurisdiction and notify of changes of address: *Criminal Code* RSC 1985, c 46 (Can), s 742.3(1).

<sup>261</sup> For discussion, see Julian Roberts and Carol La Prairie, *Conditional Sentencing in Canada: An Overview of Research Findings*, Department of Justice (Canada), Ottawa (2000), 3; Julian Roberts, Daniel Antonowicz and Trevor Sanders, 'Conditional Sentences of Imprisonment: An Empirical Analysis of Conditions' (2000) 30 *Criminal Reports* 113 and Roberts, n 116, 70.

<sup>262</sup> Freiberg, n 18, 126.

<sup>263</sup> Julian Roberts, 'Reforming Sentencing and Parole in Canada' in Michael Tonry (ed), *Penal Reform in Overcrowded Times*, Oxford University Press, New York (2001) 227, 228.

<sup>264</sup> Jack Gemmell, 'The New Conditional Sentencing Regime' (1997) 39 *Criminal Law Quarterly* 334, 336-7.

### 2.5.2 The Supreme Court's decision in *Proulx*

In 2000, the Supreme Court handed down a unanimous guideline judgment in *Proulx*,<sup>265</sup> which clarified that 'there should be a presumption that the offender serve the remainder of his or her sentence in jail if a condition has been breached'.<sup>266</sup> Lamer CJ also stated on behalf of the Court that a conditional sentence:

will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. *However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence.*<sup>267</sup>

His Honour went on to say:

A conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.<sup>268</sup>

It was held that although the court has to exclude both probation and 'a penitentiary term' before proceeding to impose a conditional sentence, there is no requirement that the judge impose a term of imprisonment of a fixed duration at the first stage in the two-step process.<sup>269</sup> Lamer CJ therefore concluded that 'a conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed'. The sole requirement under the Canadian regime is that the duration and conditions of a conditional sentence make for a just and appropriate sentence'<sup>270</sup> and research has found that conditional sentence lengths became progressively longer following the decision.<sup>271</sup> Roberts has suggested that allowing extension of the term may make judges more likely to use the conditional sentence, as it becomes a more plausible alternative to immediate imprisonment,<sup>272</sup> but elsewhere argues that extension of the term should occur only on a case-by-case basis with the court required to justify its reasons for doing so.<sup>273</sup> He also suggests that:

allowing judges to extend the conditional sentence may result in them paying less attention to the optional conditions of the order, reasoning that the sentence has been

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<sup>265</sup> *R v Proulx* [2000] 1 SCR 61 (*Proulx*), [39]. Manson has described the decision as a pragmatic realisation that a distinction had to be drawn with probation, but with the result that 'the subsequent exercise is a subtle and challenging one, akin to looking for an intermediate sanction in a Criminal Code haystack': Allan Manson, 'The Conditional Sentence: A Canadian Approach to Sentencing Reform or, Doing the Time-Warp, Again' (Paper presented at the Changing Face of Conditional Sentencing Symposium, Ottawa, 27 May 2000), 11.

<sup>266</sup> *Proulx*, *ibid*, [39].

<sup>267</sup> *ibid*, [22]. Emphasis in original.

<sup>268</sup> *ibid*, [41].

<sup>269</sup> *ibid*, [58].

<sup>270</sup> *ibid*, [127]. See also *R v Brady* (1998) 121 CCC (3d) 504, 530, fn 3.

<sup>271</sup> Canadian Centre for Justice Statistics, *Highlights of the Conditional Sentencing Special Study*, Bulletin, Minister of Industry, Ontario, (2002), 2.

<sup>272</sup> Julian Roberts and Thomas Gabor, 'Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration' (2004) 44 *British Journal of Criminology* 92, 109.

<sup>273</sup> Roberts, n 134, 52.

made sufficiently harsh by its extended duration. This would be regrettable, since the optional conditions are vital to the success of the sanction.<sup>274</sup>

The Court also held that conditional sentences ‘should generally include punitive conditions that are restrictive of the offender’s liberty. Furthermore, conditions such as house arrest or strict curfews should be the norm, not the exception’.<sup>275</sup> This exhortation seems to have had a significant effect: Paciocco and Roberts found that following *Proulx*, the use of house arrest more than doubled in cases dealt with in Ontario, while Manitoba saw its use increase from 5% to 47% of cases,<sup>276</sup> while more recent data indicate almost two-thirds of conditional sentences carry a house arrest condition.<sup>277</sup>

It is also relevant to note that the Supreme Court in *Proulx*<sup>278</sup> endorsed the view of the Alberta Court of Appeal in *Brady* that a conditional sentence ‘drafted in the abstract without knowledge of what actual supervision and institutions and programs are available and suitable for this offender is often worse than tokenism: it is a sham’.<sup>279</sup> The decision therefore highlights the need for better communication between the courts and those tasked with enforcing their orders.<sup>280</sup>

### 2.6 Conclusion

This Chapter discusses some of the key issues in relation to suspended sentences and highlight points of convergence and difference by presenting a comparative analysis of the use of suspended sentences in Australia and other common law jurisdictions. In particular, the process for imposing a suspended sentence and the case law on the ‘*Dinsdale* two-step’ is reviewed, as well as the legislative constraints on the circumstances in which suspended sentences may be imposed in the various Australian jurisdictions. Provisions on the length of sentence and operational period which can be imposed are also examined, suggesting that setting legislative limits on

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<sup>274</sup> *ibid*, 42.

<sup>275</sup> *Proulx*, n 265, [36]. For discussion of some offenders’ perceptions of complying with their curfew, see Roberts, n 116, 103-106. Cf the criticism of house arrest in *R v Brady* (1998) 121 CCC (3d) 504, where the Alberta Court of Appeal stated, [48]: ‘For hundreds of years, Anglo-Canadian law has decreed that a man’s home is his castle. It is not his prison. What is staying in the comfort of one’s own home, sleeping in one’s own bed, remaining with one’s family, phoning, watching TV, listening to the radio or stereo, and reading whenever one wants? In essence it is carrying on with one’s life, except possibly for working. We cannot equate that with actual imprisonment. Saying that such a conditional sentence is tantamount to imprisonment does not make it so. The citizens of this country would never equate house arrest with prison. And with good reason. Staying at home means more comfort, more options, more flexibility; in short, considerably more freedom than jail.’

<sup>276</sup> David Paciocco and Julian Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death with a Particular Emphasis on Conditional Sentencing*, Canada Safety Council, Ottawa (2005), 11-12. The overall use of conditions also increased, with offenders in Ontario previously required to observe an average of 2.3 ‘optional’ conditions in 1997-8, which rose to 3.8 in 2000-1, while the average offender in Manitoba was required to adhere to ‘almost two more conditions’.

<sup>277</sup> Roberts, n 258, 29. As discussed above, however, there is a significant risk that increasing the punitive element of the sentence also increases the likelihood of breach: see discussion in [2.2.4] especially von Hirsch, n 148, 67.

<sup>278</sup> *Proulx*, n 265, [73].

<sup>279</sup> *R v Brady* (1998) 121 CCC (3d) 504, [135].

<sup>280</sup> See discussion in [3.4.3], (Q9).

the availability of a suspended sentence may result in sentencers artificially moulding sentences to fit within the prescribed limits. Legislative provisions designed to increase the bite of the suspended sentence and powers in relation to breaches are considered, as well as the availability of partly suspended sentences.

My discussion does not argue for a particular 'right' way of using suspended sentences, but demonstrates the panoply of ways in which this sentencing disposition may be employed. This has drawn attention to both flaws and innovations which provide a useful context for consideration of the Tasmanian sanction. Although differences in the powers and policies in each jurisdiction makes any inter-jurisdictional comparison fraught with complications, the discussion in this Chapter provides an essential context for further analysis of the use of suspended sentences in Tasmania. In the words of H V 'Doc' Evatt, '[c]omparative law generally should be a subject of continuous research by all who, in any State of Australia, are concerned in improving the system of administering justice'.<sup>281</sup>

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<sup>281</sup> Herbert Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal Supplement* 52, 52.

### 3. INTERVIEWS WITH JUDICIAL OFFICERS

*[T]he social importance of sentencing is a powerful argument in favour of careful research. More ought to be known about the motivation of judges and magistrates. Such knowledge would assist in the formation of sentencing policy, and might also help to extend a form of accountability into this sphere of public decision-making.*<sup>1</sup>

#### 3.1 Introduction

The discussion in this Chapter presents a vital – indeed, almost unique – contribution to comprehending an ill-understood sentencing disposition and sentencing generally by unveiling judicial thinking on the use of suspended sentences. In this Chapter, I examine the findings of face-to-face interviews with 16 Tasmanian judicial officers conducted between August 2006 and March 2007. The interview questions were designed to enable respondents to express their views on a broad range of topics relating to suspended sentences, namely:

- the purposes and objectives of suspended sentences;
- the proper approach to imposing a suspended sentence and the application of these principles in practice;
- information and communication with offenders, the court and the public;
- the role of public opinion and the media;
- breaches of suspended sentences;
- partly suspended sentences; and
- recognizance release orders for Federal offenders.

#### 3.2 Previous judicial research on sentencing

Almost as much appears to have been written on the dearth of information on judicial views on sentencing as on the findings of such research. Mackenzie observed in her recent book, *How Judges Sentence* that '[w]hat judges think about sentencing and how they approach this task are largely missing links in sentencing research',<sup>2</sup> suggesting that '[t]he voices of those who actually sentence offenders are rarely heard, despite the fact that they have much to add to the knowledge and debate in the area'.<sup>3</sup> Ashworth has spoken of 'the irony that judges sometimes berate academics for not understanding practice when it is the judges who bar the way to research by means of observation and interview',<sup>4</sup> noting that:

One continuing feature of sentencing as a social practice is the paucity of empirical research on the decision-making processes of sentencers...there remains considerable

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<sup>1</sup> Andrew Ashworth, 'Role of the Sentencing Scholar' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press, Oxford (1995) 251, 263.

<sup>2</sup> Geraldine Mackenzie, *How Judges Sentence*, Federation Press, Sydney (2005), 2.

<sup>3</sup> *ibid*, 11. See also Geraldine Mackenzie, *A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing*, (PhD Thesis, University of New South Wales, 2001), on which the book is based and Geraldine Mackenzie, 'The Art of Balancing: Queensland Judges and the Sentencing Process' (2003) 28 *Alternative Law Journal* 288, 31.

<sup>4</sup> Ashworth, n 1, 263.

### 3. Interviews with judicial officers

judicial resistance to this...and there are still very few studies of sentencers which involve interviews and close observation.<sup>5</sup>

Some argue that there is in fact little to be gained from such research. Pierce, for example, who himself interviewed 80 senior judges around Australia, claimed that in-depth interviewing 'adds little, for example, to studying statistical correlations between judges' social backgrounds and sentencing patterns in criminal cases'.<sup>6</sup> One researcher who sought the opinion of a judge about interviewing judges was told that judges lie, and when they do not, are mistaken in their self-perceptions and their answers must therefore be treated with caution.<sup>7</sup> The then English Lord Chief Justice denied permission to follow up a pilot study of judges of the Crown Court led by Ashworth 'on the grounds that it might add to the pressures under which the Court was already working'.<sup>8</sup> Ashworth later reported that Lord Lane 'put forward the view that the principles on which judges pass sentence are well known from the textbooks, and that it would not be worth the judicial time and public money to continue with the research'.<sup>9</sup> This led Ashworth to conclude that judicial reluctance to welcome researchers 'might be a fear of unfairly adverse criticism, apprehension about the use of research findings by the government, and beliefs about judicial independence'.<sup>10</sup>

Appendix C sets out in chronological order the principal studies in common law jurisdictions involving interviews and/or questionnaires with judicial officers on sentencing. Most of the studies deal with general sentencing principles and there is a paucity of research that examines particular types of sentence. Although Bray and Chan<sup>11</sup> conducted interviews with NSW judges and magistrates on community service and periodic detention orders in 1991 and McFarlane and Poletti<sup>12</sup> recently

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<sup>5</sup> Andrew Ashworth, 'European Sentencing Traditions' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002) 219, 232.

<sup>6</sup> Jason Pierce, 'Research Note: Interviewing Australia's Senior Judiciary' (2002) 37 *Australian Journal of Political Science* 131, 132. See also Lee Epstein, 'Interviewing US Supreme Court Justices and Interest Group Attorneys' (1989-1990) 73 *Judicature* 196, 198.

<sup>7</sup> Milton Heumann, 'Interviewing Trial Judges' (1989-1990) 73 *Judicature* 200,

<sup>8</sup> Andrew Ashworth et al, *Sentencing in the Crown Court: Report of an Exploratory Study*, Centre for Criminological Research, University of Oxford (1984), 5.

<sup>9</sup> Andrew Ashworth, 'Sentencing and Sensitivity: A Challenge for Research' in Lucia Zedner and Andrew Ashworth (eds), *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood*, Oxford University Press, Oxford (2003) 295, 320. See also Ashworth et al, *ibid*, 64. It is worth noting that the questionnaires of judges on sentencing undertaken by the ALRC in 1979 had a lower contribution from Victorian judges after 'a draft letter, incorporating various criticisms of the survey and setting out reasons for not answering the questionnaire, was apparently circulated amongst County Court and Supreme Court Judges in that State': Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report 15 (Interim), Canberra (1980), 495. Hood also encountered difficulties when he sought to interview judges about race in sentencing, reporting that 'Unfortunately [the judges] were, I was told, instructed "by the powers that be" in the judiciary not to co-operate with this part of the planned study': Roger Hood, *Race and Sentencing*, Clarendon Press, Oxford (1992), 37.

<sup>10</sup> Ashworth, *ibid*, 327.

<sup>11</sup> Rohan Bray and Janet Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in NSW*, Monograph Series, No 3, Judicial Commission of New South Wales, Sydney (1991).

<sup>12</sup> Katherine McFarlane and Patrizia Poletti, *Judicial Perceptions of Fines as a Sentencing Option - A Survey of NSW Magistrates*, Monograph 1, Sentencing Council, Sydney (2007).



conducted a survey of magistrates on the use of fines as a sentencing option, there is no Australian research which has specifically canvassed the views of judicial officers on suspended sentences. Due to the lack of comparable studies in Australia, I was therefore guided in my approach by the Canadian research on conditional sentences, which appears to constitute the only common law interview research on sentences of this nature, although the differences between conditional and suspended sentences are acknowledged.

In 2000, Roberts, Doob and Marinos<sup>13</sup> released the findings of a questionnaire administered to 461 judges on the then new sanction of conditional sentences. The stated aim of the study was to understand judicial reaction to the sanction, with the authors pointing out that one way of doing so is through an analysis of case law, and the other is through a systematic survey of trial court judges. The authors went on to suggest that there are three weaknesses with the case law approach. Firstly, only a very small proportion of sentences are captured by the reporting services. Secondly, only noteworthy cases are reported, which are therefore not representative of the majority of conditional (or suspended) sentences imposed. Although these criticisms do not apply in respect of decisions in the Tasmanian Supreme Court, all of which are published on the Court's website, they are certainly applicable in respect of decisions in the Magistrates' Courts, which are not made publicly available. Finally, the authors suggest,

the underlying judicial reasoning [in reported decisions] has, to a large extent, to be inferred, as the judgement is not usually comprehensive enough to explain all the reasons giving rise to the sanction. Trial judges rarely have the time to write judgements that explain all the relevant factors considered at the time of sentencing. A survey on the other hand, has the advantage of containing direct questions relating to the use of the conditional sentence.<sup>14</sup>

This third point clearly is equally pertinent in the Tasmanian context. Although suspended sentences are obviously not a new sentencing option in Tasmania, the parallels between the jurisdictions and subject matter of the study appeared sufficient to adopt some of the questions posed in that study in my own research. I therefore included in my interview questions four of the 20 questions from that study.<sup>15</sup> My research is also informed by the findings of a follow-up study conducted by Roberts and Manson<sup>16</sup> involving group interviews with 18 appellate judges on their use of

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<sup>13</sup> Julian Roberts, Anthony Doob and Voula Marinos, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey*, Report 2000-10e, Department of Justice, Ottawa (2000); Julian Roberts and Carol La Prairie, *Conditional Sentencing in Canada: An Overview of Research Findings*, Department of Justice, Ottawa (2000), Ch 2.

<sup>14</sup> *ibid*, 1.

<sup>15</sup> Because the purpose of my study is not a comparative analysis with Canada, I do not intend to discuss the findings of that study in detail. It is also important to note key differences in that study. In particular, although 461 judges responded to the questionnaire, they represented only 36% of the relevant population and it can therefore hardly be said that the views represented a comprehensive position of judicial views on conditional sentences. In addition, at the time of the study, such sentences had only been available for a few years and many of the sentencers had had very little practical experience with them.

<sup>16</sup> Julian Roberts and Allan Manson, *The Future of Conditional Sentencing: Perspectives of Appellate Judges*, Department of Justice, Ottawa (2004).

conditional sentences. The findings from this and other relevant studies are interspersed in the discussion where appropriate.

### 3.3 Methodology

There are two levels of courts in Tasmania, the Supreme Court and the Magistrates' Court,<sup>17</sup> with sentencing matters generally heard by a single judge or magistrate respectively.<sup>18</sup> Appeals against sentences imposed in the Supreme Court are heard by the Court of Criminal Appeal, constituted by a bench of three or more judges.<sup>19</sup> Appeals against a sentence imposed by a magistrate are heard by a single Supreme Court judge.<sup>20</sup> At the time of my study, there were six judges and 12 magistrates appointed.

Due to the small size of the Tasmanian judiciary, it was clear that it would not be possible or desirable to conduct any statistical analysis on the responses. Furthermore, a closed-question approach or written questionnaire would not have suited my research purposes, which was to delve into the sentencers' minds about a range of complex and often ill-understood issues on suspended sentences. As Roberts and Manson have noted, '[a] written survey generates information in response to specific questions, but does not permit researchers to probe responses.'<sup>21</sup> Accordingly, open-ended questions were drafted for a semi-structured interview,<sup>22</sup> which, as Mackenzie found in her research, 'allowed the judges to answer according to their own perceptions of the question, and without being influenced by any preconceptions of what the interviewer was asking for'.<sup>23</sup>

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<sup>17</sup> The Magistrates' Court is also referred to as the Court of Petty Sessions when sitting in criminal matters.

<sup>18</sup> Some matters in the Magistrates Court are resolved by two or more Justices of the Peace (JPs) sitting together, however their jurisdiction is limited to minor traffic matters. A preliminary examination of data supplied by the Department of Justice, indicated that in 2003-4, 99% of sentences imposed by JPs were fines. Accordingly, sentencing by JPs is not discussed in this thesis and JPs were not interviewed as part of my research.

<sup>19</sup> *Criminal Code Act 1924* (Tas), s 400. There is provision for matters to be resolved by two judges if neither party objects.

<sup>20</sup> *Justices Act 1959* (Tas), s 110.

<sup>21</sup> Roberts and Manson, n 16, 11.

<sup>22</sup> For discussion on qualitative research and interview methodology, see Michael Brenner, Jennifer Brown and David Canter (eds), *The Research Interview, Uses and Approaches*, Academic Press, London (1985); William Foddy, *Constructing Questions for Interviews and Questionnaires*, Cambridge University Press, Melbourne (1993); Mark Dantzker and Ronald Hunter, *Research Methods for Criminology and Criminal Justice: A Primer*, Butterworth-Heinemann, Boston (2000); Michael Maxfield and Earl Babbie, *Research Methods for Criminal Justice and Criminology*, Wadsworth, Belmont (3rd ed, 2001); Martin Bulmer (ed), *Questionnaires*, Sage Publications, London (2004); Bruce Berg, *Qualitative Research Methods for the Social Sciences*, Pearson, Boston (5th ed, 2004); Lyn Richards, *Handling Qualitative Data*, Sage, London (2005); Maggie Walter (ed), *Social Research Methods: An Australian Perspective*, Oxford University Press, Melbourne (2006) and William Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, Pearson, Boston (6th ed, 2006).

<sup>23</sup> Mackenzie, n 2, 9. As Mackenzie went on to note, the downside of this approach is that interview subjects may give different responses to the question, which reflect their understanding of both the question and experience with that particular issue. I sought to minimise the effect of this by using similar terms when prompting respondents or clarifying my questions.

The interview questions were developed after consulting with Chief Justice Underwood and Chief Magistrate Shott and are set out in Appendix D. Approval for the project was obtained from the Human Research Ethics Committee (Tasmania) Network and a letter was sent to each judge and magistrate in August 2006 (Appendix E), inviting them to participate on a voluntary and anonymous basis, with a copy of the questions proposed to be asked and a consent sheet (Appendix F) attached.<sup>24</sup> The interviews were audio-recorded<sup>25</sup> and lasted between 30 and 90 minutes, with most interviews lasting about one hour. Respondents were invited to amend the verbatim transcript emailed to them and if no additional comment was received, it was assumed that the respondent adopted the version sent to them.<sup>26</sup>

All six Supreme Court judges were interviewed, which I believe represents the first study of its kind to canvass the views on sentencing of all members of a particular court. In addition, ten out of the 12 magistrates were interviewed, giving me a comprehensive view of the Tasmanian magistracy on suspended sentences.<sup>27</sup>

## 3.4 Discussion of findings

The findings from the interviews will now be examined. Although the responses were often quite lengthy, it was considered important to present the respondents' comments in full wherever possible, as they provide a rich and rare insight into judicial thinking.

### 3.4.1 Purposes and objectives of suspended sentences

In asking the questions discussed in this section, I sought to ascertain respondents' views in respect of the objectives of suspended sentences and how they perceive suspended sentences as meeting the primary sentencing objectives. Many of the respondents did not appear to have previously given much consideration to which

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<sup>24</sup> At the beginning of each interview, respondents were required to sign an informed consent sheet and invited to ask any questions about the research project. It was reiterated that they would not be able to be individually identified in the final write-up. To this end, I had to be careful not to identify any female respondents. As all six judges were interviewed, it follows that I spoke with Tennant J, the single female judge appointed, but the personal pronoun 'he' is used when referring to individual judges to avoid potential identification of Justice Tennant.

There were also two female magistrates at the time of my interviews. Since I did not interview all magistrates, no assumption should be made as to whether any female magistrates were interviewed.

<sup>25</sup> In one interview, the recording equipment failed for eight questions. It became apparent during the interview that there had been a problem with the recording and I therefore took notes immediately following the interview. Fortunately, the judge's associate had also attended the interview and the two carefully reviewed my contemporaneous notes. We were therefore able to reconstruct the import, if not the exact wording, of the original responses to these questions. Electronic copies of the interviews are kept in a locked drawer in the Faculty of Law, University of Tasmania in accordance with the requirements of the ethics approval process.

<sup>26</sup> Most respondents did not make any changes or made only cosmetic changes. As Mackenzie noted, responses of this kind may appear 'chatty', as they are not 'court judgments tempered by the constraints of formal legal writing': Mackenzie, n 2, 11. I found this particularly valuable as the respondents appeared to be relaxed during the interview and were very candid in providing information.

<sup>27</sup> Only one magistrate did not agree to being interviewed, without giving any reasons for this decision. The remaining magistrate wished to participate but was unable to do so at the time of the interviews due to personal circumstances.

sentencing objectives underpin their use of suspended sentences, echoing an earlier finding by Ashworth that ‘many judges appeared to have devoted little thought to the principles on which they act’.<sup>28</sup> This is perhaps not surprising, for as Hart has observed:

No one expects judges or statesmen occupied in the business of sending people to the gallows or prison...to have much time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair.<sup>29</sup>

#### **What do you consider to be the most important objective of suspended sentences? (Q1)<sup>30</sup>**

It is clear that there is no single guiding objective for a suspended sentence, with five respondents referring to rehabilitation as the main objective, four referring to deterrence and a further four saying it was a combination of the two. Three respondents referred expressly to a sword hanging over the offender’s head, although it was not clear whether this was perceived as fulfilling the objective of rehabilitation or deterrence. Whereas M1 spoke of a sword hanging over the person’s head ‘to specifically deter that person from doing it again’, J4 said the main objective was ‘to encourage rehabilitation. Well, it seems to me it’s obvious that it works like the Sword of Damocles hanging over you. You behave and mend your ways over the next two years, otherwise you’ll go to prison’. J5 suggested that ‘what a suspended sentence really does is make a statement to the offender that this is serious, that you’re going to go somewhere, and he’s looking over the edge – and I’m interested in future control’, while some spoke of giving the offender ‘another chance’ (M9) or ‘final warning before the ultimate sentence’ (M10).

Only one respondent referred to denunciation as a primary objective, suggesting that ‘there’s also a denunciation aspect to it, in that it shows the seriousness with which the offence is viewed – to the extent that a sentence that you don’t have to serve can do that’ (J2). While only one judicial officer mentioned denunciation as a primary objective, responses to Q4 suggest denunciation is the primary objective in some cases. Just deserts was mentioned by only one respondent, who considered that the purpose of a suspended sentence was ‘to ensure that each defendant receives his or her just deserts...all sentencing comes from desert’ (M8).

Prior to the interview, J6 had examined all suspended sentences he had imposed in the previous year and suggested that this issue would be determined on a case-by-case basis, as ‘the reasons for imposing them were different, depending on the

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<sup>28</sup> Ashworth et al, n 8, 61.

<sup>29</sup> H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford (1968), 2. Note also Fox and Freiberg’s observation that the five purposes of sentencing (just deserts, rehabilitation, deterrence, denunciation and protection, or any combination thereof) cannot in logic coexist and that ‘uncertainty as to which, if any, should be paramount is reflected judicially in vacillation and eclecticism with the justifications for sentence differing between sentencers and varying from offence to offence’: Richard Fox and Arie Freiberg (eds), *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne (2nd ed, 1999), 203. See also Heumann, n 7.

<sup>30</sup> See Roberts, Doob and Marinos, n 13, Q2 and Table 2.3.

particular case. So I don't know if there's a most important reason generally, I think it's in the particular case it becomes important.'<sup>31</sup>

**Do you think that a suspended sentence can be (as) effective (as immediate imprisonment) in achieving the following sentencing objectives?<sup>32</sup> Why or why not? (Q2)**

M4 chose to answer this question in a general fashion, arguing that it was 'a very wide question' and suggesting that:

For some people, the only sentence they will feel is real is an actual jail sentence and you see those people breaching suspended sentences very soon after they've received it. And those people that aren't deterred at all by a suspended sentence come to light reasonably quickly, I think, as a general proposition. A suspended sentence with some people, depending on their history, their psyche, their makeup, can serve all of these principles as well as an immediate [sentence].

#### **– Rehabilitation?**

There was overwhelming support amongst both judges and magistrates for the view that a suspended sentence is at least as effective as immediate imprisonment in aiding rehabilitation, with most regarding it as more capable of doing so. J4 was 'pretty cynical about actual imprisonment aiding rehabilitation', while J1 regarded prison as 'just a breeding ground for worse offenders, unfortunately... if they don't come out with much worse habits than when they went in, I'd be most surprised', with M3 and M9 echoing this sentiment.<sup>33</sup> J2 remarked:

I don't know that prison achieves anything in respect of rehabilitation. So it's absolutely better in that respect. I suppose there are some people that go in to prison and derive some benefit from programs in there but...that's not a rehabilitation institution, that's a punishment institution and [the] people who go there and meet nastier people than themselves come out worse than when they went in. Now some of them, no doubt, have sufficient self-discipline to learn from that experience to try very hard not to do anything that will land them back there again but I think that a suspended sentence is far more likely to have that effect.

On the other hand, two judges also regarded actual imprisonment as also capable of promoting this end. J5 suggested that a suspended sentence is 'more effective than actual imprisonment on most occasions', but that 'sometimes rehabilitation is served by having some quiet time in the slammer. Three meals a day and get your life sorted and sometimes...it gives you time to kick whichever habit you're on'. For J6,

rehabilitation is a problematic concept. At times I receive earnest pleas from defence counsel to have regard to the need to encourage rehabilitation and not jail the person and I fire back at them and say – 'Isn't jail a rehabilitating thing? Does it not make people think they shouldn't commit crime again, because they don't like jail?'...Nevertheless, I think rehabilitation is the most important concept I have regard to when imposing a suspended sentence.

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<sup>31</sup> Interestingly, this answer is later contradicted when J6 said that rehabilitation is the most important sentencing rationale with respect to suspended sentences.

<sup>32</sup> See Roberts, Doob and Marinos, n 13, Table 2.5.

<sup>33</sup> This would also appear to accord with public sentiment, with a recent English poll finding that only 16% of respondents disagreed with the statement: 'Most people come out of prison worse than they go in': Rob Allen, 'What Works in Changing Public Attitudes: Lessons from Rethinking Crime and Punishment' (2004) 1(3) *Journal for Crime, Conflict and the Media* 55, 58.

While most of the responses to this question focused on the inability of immediate imprisonment to reform, some spoke in positive terms of a suspended sentence's ability to do so. M2 said that suspended sentences can be 'very effective' if 'they're delivered properly...in a context where the defendant has an appreciation that [his conduct] was classified as being worthy of a sentence of imprisonment...but that he's been given this opportunity to stop offending'. J1 suggested that a suspended sentence allowed for offenders to 'stabilise their future' where 'they've got prospects of employment, they're doing a TAFE course or learning a trade or something and I would take the view that if they can take that up, which they won't be able to do if I put them in jail'.<sup>34</sup> M7 also thought a suspended sentence 'can be useful as a rehabilitative tool', particularly where 'accompan[ied]...with other orders, say a probation or such like'. For M5, a suspended sentence is preferable to immediate imprisonment

because it avoids the negative impact of a term of imprisonment, and that's not just the time in prison which is, you know, the negative influence of others and so on, but it's also the severing of links that you have within the community, so loss of employment, often loss of housing, real dislocation from the community, support from others and so on. As well as stigmatisation for future employment. I also commonly – and I think many magistrates and judges would do this – I suspend sentences often on a raft of conditions which are very much tailored toward rehabilitation, so it might be attending a family violence intervention program or attending drug and alcohol counselling. Now you just can't achieve that with a prison sentence. I think we all know that the resources that are available in prison are still limited...for example the family violence intervention program is not available in prison and it is externally.

#### – Deterrence?<sup>35</sup>

My question did not distinguish between general and specific deterrence, but I prompted some respondents to comment on both aspects of deterrence. Accordingly, some respondents focused only on one form of deterrence, while others addressed both aspects. For M8, however, 'when you're suspending a sentence for someone in an appropriate case where it's just unfair for them to be imprisoned, you're not really considering deterring anybody'.

#### **General deterrence**

Amongst those who spoke about general deterrence, suspended sentences were not widely perceived as meeting this objective, with several expressing the view that people see a suspended sentence as no penalty at all (J2; J3; M7). In fact, for J3, the general public are not only not 'deterred by seeing someone getting a suspended

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<sup>34</sup> It is in this context somewhat perturbing to note that Tasmania has the lowest rate of employment and community work for prisoners in Australia, with only 57% of prisoners employed in 2006-7, compared with a national average of 79%. Prisoner education and training rates, by contrast, are much higher than the national average (62% vs 32%): see Steering Committee for the Review of Government Service Provision, *Report on Government Services*, Productivity Commission, Canberra (2008), Table 8.A20, 8.A21. For discussion of the provision of vocational education training in Tasmanian prisons, see Sian Halliday Wynes, 'Improving VET for Adult Prisoners and Offenders in Australia' in Susan Dawe (ed), *Vocational Education and Training for Adult Prisoners and Offenders in Australia: Research Readings* (2007) 72, 130-1. See also Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008 (TLRI), 10-15.

<sup>35</sup> See [1.4.2] for discussion of the literature on deterrence.

sentence [but] if anything, they're encouraged by it!'. J1 said 'I suspect it probably doesn't [deter generally], but it should be able to', but also saw it as 'a problem' that if people see that a particular class of offender has received a suspended sentence, 'somebody out there who commits the same type of offence in similar circumstances and their situation is much the same, they might respond, oh, they're not going to send me to jail.' On the other hand, M5 said that although a suspended sentence would generally be less effective than an actual jail term,

if the community in a particular case understands the court's reasoning, why the court in that particular case, or with that particular offender, chose a suspended sentence, I think it could be almost as effective. Because the community would see, look, that's jailable, if you do that, it's a jailable offence, and there were really good reasons why this person didn't receive that sentence...A lot of it depends on the confidence the community has in the process and the reasons why the court chose that particular outcome for that person.

Several expressed their reservations about general deterrence as a sentencing objective, with M2 saying 'I've got a bit of a problem with general deterrence', and M3 declaring that 'the jury's out in my mind about the effectiveness of imprisonment and the effectiveness of deterrent sentences'. J5 was also cynical about whether 'general deterrence works', but suggested it might do so in relation to underage sex offences and corporate crime, adding that 'in any event a suspended sentence would not have the [same] effect as immediate imprisonment'. Only one judge, J4, suggested that:

if sentences of imprisonment generally do deter at all, then I think it has some effect because publicity is often given on the basis that 'offender got twelve months imprisonment' and then a bit lower down 'it was ordered to be wholly suspended', so I think it might have some effect in that respect.

#### ***Personal deterrence***

Personal or specific deterrence was seen as being quite well served by a suspended sentence 'if it's explained properly...that it's a sentence of imprisonment' (M3). A suspended sentence was generally considered to be at least as effective as actual imprisonment in terms of specific deterrence,<sup>36</sup> although for J5, the best combination would be a partly suspended sentence, as this is 'more effective deterrence than total imprisonment and is probably a touch more effective than total suspension'. J2 thought a suspended sentence would be more effective,

because a lot of the time when people go in to prison they come out as more of a worry than when they went in and if they've got a suspended sentence hanging over them, then in most cases and to a degree that might [stop them] from misbehaving, or as badly or as much.

Four magistrates spoke about the threat of prison or the fear of the unknown, and the desirability of maintaining that fear. M9, for example, suggested that for some people, 'the thought of going to jail is horrifying', and for such offenders a suspended sentence 'does give them a deterrent'. M7 thought that for someone who has never been to prison, especially a youthful offender, 'it's probably better to leave

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<sup>36</sup> Mackenzie's interviews with Queensland judges also revealed support for the proposition that suspended sentences are a useful method of deterring an offender: Mackenzie, n 2, 111.

them with the fear of the unknown' than to 'have them experience it and...be familiar with it'. This was echoed by M3, who suggested that 'unfortunately it may be that once a person's been imprisoned, the initial fear goes', so 'if you can drag out that fear as long as you possibly can, then it may have a greater deterrent effect'.

M2 was concerned that some offenders may not respond to the threat of prison, and there consequently 'needs to be support able to be given to a defendant to keep his incentive up to comply with the provisions of the suspended sentence', while M5 suggested that:

in the right case, suspended sentences are more effective in my view in achieving personal deterrence. In the wrong case, it can send the wrong message to the offender, which can be, look, if you go ahead, there'll be a lenient response from the court and you'll get off, so almost a green light to commit further offences in the wrong case. But speaking generally, I think in terms of personal deterrence it provides a fairly powerful motivation to not offend in the future.

M10 was more cynical, arguing that:

some sensitive individuals that find themselves in trouble because they've been careless, or maybe even unlucky, then yes, it will put them off as effectively, and arguably even in some unusual cases more effectively than if they went to prison...but most people we deal with are fairly hard-bitten offenders, whether it's drink driving or burglary and stealing, they're offending out of desire or habit or other factors that are hard to break.

#### – Denunciation?<sup>37</sup>

All six judges said that a suspended sentence could not denounce as effectively as immediate imprisonment, with five referring to the fact that a suspended sentence is not regarded as real punishment by the public.<sup>38</sup> J6 observed that 'the more severe the sentence, the greater the denunciation' and J4 noted:

The answer to that question is (a), the conventional wisdom is yes, (b), I used to think so and (c), I don't any more...I think the public full well know you're either in prison or you're not in prison and if you're not in prison, they see it as not being really a sentence of imprisonment and I think it's academic...to say 'well, it is actually a sentence of imprisonment' because it doesn't carry that perception or that threat.

Magistrates were more likely to regard the aim of denunciation as being met by a suspended sentence. M7 said 'I think it can', without elaborating further, while for M8, 'I think you achieve it in the same way as if it was an immediate term of imprisonment' because 'you impose a term of imprisonment as a way of indicating to the public that you're trying to apply the public's standard to impose a condign punishment. And there are other reasons why you suspend it'. M9 felt that:

it's still a jail sentence. You're saying, this is serious enough to warrant a prison sentence. So in that sense, it does, because it brings home to the person how seriously we regard it. But perhaps it doesn't to the independent observer. I think it does to the person who's in the court, because they know why I'm suspending it and they know what they did was serious.

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<sup>37</sup> See [1.4.1] for discussion.

<sup>38</sup> For discussion of this argument against suspended sentences, see [1.5.2.1].



M3 suggested that a suspended sentence could denounce so long as it was explained properly that it was a sentence of imprisonment, adding:

if in fact, you've got three months imprisonment, 'but I'll suspend it' – you have the pause – 'but I'll suspend it on condition that you're of good behaviour for two years', you'd see that as worse in your mind, and so would your friends, possibly, than if I gave you 110 hours of community service orders. So that does denounce you. Because someone has thought that what you've done deserves imprisonment...

It was suggested by M1, however, that offenders themselves would not regard the sentence as serious denunciation, since 'I know the defendants would probably rather have a suspended sentence...the person that gets the community service order thinks that's worse because they've actually got to do something'.<sup>39</sup> M5 also argued that a suspended sentence would not generally be as effective in achieving denunciation because 'immediate jail sends this clear, absolutely unequivocal message that this conduct falls into such a category that actual jail is required, and it's a black and white message, rather than a complex grey message that suspended jail is', but went on to say that it could be almost as effective 'where you have an offence that typically people may not expect somebody to receive a jail sentence for'. Finally, M10 claimed to have 'hardly ever used denunciation as a sentencing principle', but went on to say that 'if denunciation was the object, then prison is certain, in my court', thereby implying that a suspended sentence could not serve the purpose of denunciation.

### 3.4.2 Proper approach to imposing a suspended sentence

The two-stage process for imposing a suspended sentence laid down by the High Court in *Dinsdale*<sup>40</sup> and judicial interpretation of the test in various Australian jurisdictions considered in Chapter 2.<sup>41</sup> The questions in this section were designed to analyse the thought processes involved in the imposition of a suspended sentence. It quickly became clear that there is far from universal application of the *Dinsdale* two-step process amongst the Tasmanian judiciary, and furthermore, that some sentencers have misunderstood the effect of the decision.

#### **What is your reasoning process in deciding to impose a suspended sentence? (Q3)**

Some respondents gave me examples of when they would be likely to suspend a sentence, in which case I prompted them by asking words to the effect of 'how do you approach the task before you?' or 'I'm interested also in the thought process'. Even so, this did not necessarily elicit a clear explication of what is, admittedly, a largely unexamined and intuitive process.<sup>42</sup> There were three basic approaches:

<sup>39</sup> See [1.5.2.2] for discussion of offenders' perceptions of suspended sentences.

<sup>40</sup> *Dinsdale v The Queen* (2000) 202 CLR 321.

<sup>41</sup> See [2.2.2.2]. See also [5.3.6] for some examples of recent Tasmanian cases where judges appear to have failed to apply the test.

<sup>42</sup> Note the research of John Hogarth, *Sentencing as a Human Process*, University of Toronto Press, Toronto (1971), who suggested that 'One can explain more about sentencing by knowing a few things about the judge than by knowing a great deal about the facts of the case': 350. It has similarly been observed that 'sentences sometimes reveal more about judges than offenders, just as book reviews sometimes reveal more about reviewers than about books': Michael Tonry, *Sentencing Matters*,

reliance on instinctive synthesis; correctly applying *Dinsdale*, although some of the judicial officers mistakenly thought they were not doing so; and a failure to follow *Dinsdale*.

The majority of respondents appeared not to adopt the reasoning in *Dinsdale*, instead relying on a more instinctive approach to determining the correct sentence. J4 also appeared to echo the minority approach in *Dinsdale*, stating, ‘almost always now, I think, “it’s a bad crime but your antecedents are such, and your prospects are such, that I’ll give you one more chance but with this serious threat hanging over you”’. The following comments were also examples of the instinctive approach:

I never engage in [the thought process] until I consider an actual case. The case will dictate it for me. Young offenders are a good example, the last chance for a young offender. That’s an example of it. But I don’t think about these things unless I’ve got a case. If I had to write an essay for a lecturer I might think about it! (J6)<sup>43</sup>

I suppose I would look at it in this way – can I legitimately suspend? In other words, is the crime so great that you just can’t justify suspending? But when you come to a youth or, first offender, someone in that range, I think you can often suspend even though it’s a serious crime, because the benefit to the community in saving someone from a life of crime greatly outweighs the satisfaction of retribution. (J3)

Sometimes you go through an intellectual process, but mostly I think it just hits you. You hear the facts, the circumstances of the offence, and the offender, and it just hits you. (M8)

I suspend it if I think they deserve it to be suspended. I think they’ve got to show that they merit being suspended. In other words, some positive factor involved in relation to the particular defendant, which means that they should be given that sort of a chance. (M7)

I tend to be in the school of sentencers on what I feel about, how I feel this person should be dealt with first. I’m not a real scientific sentencer, in that respect... I sentence a lot on just my experience, what I know is a reasonable tariff for this sort of offence, what I give others for this sort of thing. (M9)

Five sentencers correctly applied the process laid down in *Dinsdale*, although two did not in fact refer to the case in this context:<sup>44</sup>

This conduct requires a jail sentence, actual or suspended, so that’s the first step of the reasoning process...And then it’s: is a suspended sentence open, taking into account prospects of rehabilitation, the circumstances of the offender and the offence, and so

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Oxford University Press, New York (1996), 177. See also Hood, n 9; Andreas Kapardis, *Sentencing by English Magistrates as a Human Process*, Asselia Press, Nicosia (1985) and Ralph Henham, 'The Importance of Background Variables in Sentencing Behaviour' (1988) 15 *Criminal Justice and Behavior* 255. For discussion of the factors which appear to be most relevant to the decision to suspend a sentence, see [5.3].

<sup>43</sup> For further discussion of the use of suspended sentences for young offenders, see [5.3.1.3].

<sup>44</sup> In this context, it is somewhat bizarre to note that in what is described as ‘the only book that examines sentencing law in all Australian jurisdictions’, Edney and Bagaric also omit any mention of *Dinsdale*. They correctly state the two-stage test, but refer instead to the English case of *R v Trowbridge* [1975] Crim LR 295: Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [13.3.2.1].

### 3. Interviews with judicial officers

will a suspended sentence work? And if the answer is no, then I'll move on to – I suppose reluctantly – to finding that I'm left with actual jail. (M5)

I get a feeling based on, I presume and I hope, the proper application of the principles, that initially the offence is worthy of a period of imprisonment, and I start from that basis. And I think to myself, well, is the offence so bad a) that it's deserving of imprisonment and b) that it's deserving of immediate imprisonment or can I see some positive aspects to which I can direct a suspended sentence to either accelerate those positive signs or develop them further in a defendant? That's my process of logic...I'm really, I suppose, strongly of the view that actual imprisonment is a last resort, but I've got to be persuaded that there are some good reasons to suspend. I don't just suspend for the sheer heck of it. (M2)

Three sentencers referred to the High Court or *Dinsdale* when correctly applying the two-stage test, but somewhat intriguingly, appeared to be mistaken or uncertain about the interpretation of the High Court's decision.

I'm not sure that my reasoning process, which we can call intuitive, stops to analyse – it does in some cases – which bits that I'm doing. I suspect that I don't quite do a *Dinsdale*, in that I probably still break it up within the first question – is this jailable? Until I've answered that one, I don't go into the suspending. Now whether in fact 'is it jailable?' gets mixed up and answered in the one question or whether I actually mentally do a two-phase process is hard to say. (J5)

For most of my career, I arrived at the conclusion first that actual imprisonment was justified, or required, before then deciding whether or not it can be suspended. But more recently, since the High Court ruled that we can go direct to suspended sentences, I have in some cases gone straight to the conclusion that it's appropriate to impose a suspended sentence, but still generally, I would go through the long process of going to imprisonment first, and then modifying that. (M10)

Well I guess, traditionally, it is that the offence has to be serious enough to attract an actual prison sentence. That's how I reason, and I know that's not how the High Court sort of is going – you look at absolutely everything in one big go, but I'd traditionally have to come to the decision that yes, this really is serious enough for a sentence [of imprisonment], and then take into account everything else again. (M4)

Finally, there were two sentencers whose approach could not be said to accord with the orthodox interpretation of *Dinsdale*:

I guess the reasoning is – is this something so serious that the offender must go to jail, or should go to jail? If not, then how can I impose a sufficient punishment without the person going to jail? So I guess working down the spectrum the most serious crimes would get imprisonment with none of it suspended. Next worst, partially suspended, next worst wholly suspended plus community service order, next worst suspended sentence, about the same level as community service order. (J2)

A suspended sentence is supposed to be an unserved jail sentence so I don't think we think that, I don't think we think jail and then we suspend it. I think – should he go to jail? No, something less. So he shouldn't go to jail, but I want to impress upon him how serious it is, and deter him from doing it, so I go to the next thing, it's the next category to jail. And it also might be accompanied by CSOs of course, to bring home. But if the person's got a full time job then I might only give them a suspended sentence and if they haven't got a full time job then I'd probably give them community service orders to bring home the immediate effect. (M1)

The foregoing comments suggest that the decision in *Dinsdale* is not well understood or applied by the Tasmanian judiciary. This finding is not entirely surprising, with

my discussion in Chapter 2 indicating that courts around Australia have struggled with the paradoxical reasoning process required to impose a suspended sentence.

**In some jurisdictions, the relevant legislation provides that a suspended sentence may only be imposed if an unsuspended sentence of imprisonment would be appropriate in all the circumstances. Do you think it would be useful to have a statement to that effect in the *Sentencing Act 1997* (Tas)? (Q11)**

As discussed in Chapter 2, several Australian jurisdictions have legislative provision which essentially enact the two-stage test in *Dinsdale*,<sup>45</sup> thereby seeking to clarify its intent and reasoning. The proposal to also introduce a legislative amendment of this nature in Tasmania was universally rejected by the judges, as they felt that this was already clear in the case law and there was no need for it to be enunciated in the legislation.<sup>46</sup> J4 was ‘philosophically committed to the legislature giving us as few directions as possible’, adding that courts take into account all the circumstances and ‘as soon as you start legislating for a circumstance, then it gets more emphasis than it should’. J6 also did ‘not want legislation with the matter...I appreciate the wide discretion we have and it is undesirable that the discretion be fettered in any way’.

The proposal was also regarded as unnecessary by most of the magistrates, with only two magistrates supporting the proposal. M2 said:

I don’t think it’s a bad thing to have it in the legislation, because that’s what the public see. If you say to the public, go and read *Dinsdale’s* case, they’ll look at you as if you’re quite mad. If you say, this is what section 2 of the *Sentencing Act* says, you can all go and look at this, they’ll say, oh yes, that’s the law. I think it’s a useful tool educationally...if there was a section on suspended sentences, saying that suspended sentences are to be applied in the following circumstances, it might be useful.

M4 gave qualified support, saying ‘I think we’re all doing that’ but also suggesting that:

it may be useful as a statement. It may focus our minds on it....We tend to get more focused on legislative provisions rather than common law principles sometimes. Maybe the judicial officer would then see that if they didn’t go through an explicit process in their comments which incorporated that they would be subject to an appeal and then when they start going through that more logical process, the community become more educated...The thing is though, where do you stop and start with amendments to sentencing principles?

Six magistrates said there was no need for such a statement as that was what they did anyway, although M3 suggested ‘it may be appropriate for others’.<sup>47</sup> M6 also ‘would not have thought it was necessary to spell out basic principles’, adding that ‘anyone

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<sup>45</sup> See [2.2.2].

<sup>46</sup> It is interesting in this context to note Hogarth’s finding that such legislative statements have limited effect, and that ‘[t]he general conclusion that can be made is that the socializing and educative influences of legal experience are far more important in controlling judicial behaviour than the formal rules laid down by parliament and the appeal courts’: Hogarth, n 42, 177. This also accords with recent findings that there ‘was a general consensus that reform should focus on improving the administration and supervision aspects rather than on statutory reforms, such as the creation of statutory exclusions’: Roberts and Manson, n 16, 2.

<sup>47</sup> This echoes Ashworth’s finding that although ‘few judges stated that they personally felt a need for more guidance on sentencing levels, a number of judges thought they would be useful to *other* judges’: Ashworth et al, n 8, 36.

who is exercising in this jurisdiction would understand it...there are a lot of principles and policies, as you know, that relate to sentencing not to be found in the *Sentencing Act*'. M5 expressed the view that 'it's one of those provisions which wouldn't do any harm', but did not see a need for it, explaining that:

that approach is fairly deeply embedded in the way judicial officers think anyway. They don't go handing out suspended sentences in cases that don't justify it, that aren't jailable, if you like. If that was a trend, then I think that it should be in place. I think it's a difficult one. I am not aware of that net-widening occurring. I mean, there are cases where, fairly discrete cases, where you're looking at a range of sentences, and you think, well, this is community service, suspended or actual. That's the range of sentences. Under normal circumstances you'd impose a community service order, but the person's not suitable, perhaps because they've breached their community service order in the past, or because they live in an isolated area or whatever, so you then go to jail. But first I think what you do is you go down, and look at whether a lesser sentence is appropriate. And that is again embedded in the way we approach things.

As it emerged, however, there was in fact some confusion as to the current position. M8 asked 'Haven't we got that in our *Sentencing Act*?', while one magistrate erroneously declared:

**M7:** It used to be that way before the *Sentencing Act*. It used to be – the law was, you first had to come to a view that the offence deserved imprisonment. Then you had to look at why it would be that the defendant's claims for individualised treatment, look at whether those claims merited suspension of the whole or part of it. That's the approach we used to have to do. Now a suspended sentence is a free-floating option.

**LB:** Well, that's not what the High Court says in *Dinsdale*.

**M7:** That's what the Supreme Court says here. And the *Sentencing Act* says here.

**LB:** The *Sentencing Act* seems to –

**M7:** As a free floating option, and there don't seem to be the constrictions on it that were there before the *Sentencing Act* came into effect, and I don't think that you can read into the Act the previous practice, where you know, that you have to think first that it merited imprisonment.

Statements of this kind and the responses to the previous question have prompted the TLRI to suggest that 'there is a good case for giving some legislative guidance as to when it is appropriate to impose a suspended sentence', proposing that that guidance be given about the imposition of suspended sentences in a way that does not interfere with judicial discretion.<sup>48</sup> Any such guidance will need to involve consultation with the judiciary to ensure it is not met with resistance.

**Some judges have indicated that one of the major reasons they impose a suspended sentence instead of a sentence of immediate imprisonment is in order to minimise offenders' exposure to the adverse effects of prison. How does such thinking play a part in your own sentencing decisions? (Q12)**

A small majority of both judges and magistrates agreed with this proposition. Four judges indicated that this was a key consideration in their sentencing, although for

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<sup>48</sup> TLRI, n 34, 28.

two this applied primarily in respect of young offenders.<sup>49</sup> J1 felt that such thinking 'certainly does' play a part, saying 'if you put an 18 year old over in that environment who doesn't have much background, they'll be worn down', with J2 expressing a similar view. For J3, this was 'very much' a consideration, 'and not only in relation to youths', whereas for J6, the concern is 'mainly with young offenders... it does not move me so much with middle-aged ones'.

On the other hand, J4 felt that 'if they should go inside, they should go inside and I don't think you should tinker about with it'. J5 also reported that this was 'not much' of a factor, saying, that in some cases,

the crime is such that I'm sorry, but that's where you're going...you'll either toughen up and survive or you won't...a starting point that says I really should be really careful about sending you to prison, that's a last resort, rarely crosses my mind...Now if I've decided it's not worth you going to prison, then we don't – the adverse effect of prison has little to do on me anyway.

M7 also said this was 'not at all' a consideration, while for M2, this was 'not usually' an issue, because 'I would take that into account in reaching the decision on whether they have to go to prison in the first place'. M10 also felt that 'it almost goes without saying – you don't send someone there if you're worried about the corrupting influences of prison except when your hand's being forced by the very seriousness of what they've done'. According to M8, if an offender

deserves prison, they go to prison! There's an illogicality in it, it seems to me, that on the one hand you say it deserves prison, but I'm not going to send you there because it does terrible things to you. Well, it does terrible things to all the people who are sent to prison. So why would you exempt somebody on that basis, where you have already determined that it's a serious enough case and there's no other mitigating factor?

Notwithstanding any possible illogicality, six magistrates reported taking this into account. M6, for example, said 'one of the circumstances where one would be tempted to use a suspended term would be the adverse consequences of imprisonment, bringing the offender into contact with persons whom he or she would not normally meet...yes, it plays a part'. Nevertheless, it was also accepted that sending people to jail could unfortunately not always be avoided. As M4 said 'sometimes, no matter how awful they find it, they're going to have to serve time', while M1 noted that although sentencers 'don't like sending people to jail...it gets to the stage where I feel I wouldn't be doing my job if I didn't send them'. M5 explained it thus:

I think you are aware of it, certainly in every case to some extent, and there are cases where you will actually talk about that, it's of such significance. You know, the young offender who's never been to prison before, who may have a rather happy-go-lucky attitude to the prospect of going to prison...I'd actually take time out to explain how other young people have found prison, and how they all hate it and so on. So, I think it

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<sup>49</sup> For a recent summary of the adverse effects of prison, including loss of employment and housing, loss of contact with family, increased financial problems and a possible deterioration in physical and mental health, see Alison Liebling and Shadd Maruna (eds), *The Effects of Imprisonment*, Willan Publishing, Cullompton (2005), Ch 1. See also Richard Edney, 'Hard Time, Less Time: Prison Conditions and the Sentencing Process' (2002) 26 *Criminal Law Journal* 139 and discussion in [1.4.4].

is prominent. But it doesn't take you any further than prison is the last resort. It just means that you're conscious of the reasons why it is and you're reluctant to send people to prison unless you have to...It doesn't alter that inevitability of prison that arises in cases.

Finally, two magistrates suggested that part of the solution was to ensure that any sentence imposed was as short as possible 'in accordance with the law' (M3), 'a short sharp dose...without them getting into the culture too much' (M1).

**The majority in *Dinsdale* held that a sentencer must first determine that a sentence of imprisonment – and not some lesser sentence – is called for, and only then determine whether the term of imprisonment is to be suspended. By contrast, Gleeson CJ and Hayne J in the minority held that the sentencing judge 'must first decide the kind of punishment to be imposed'. Inferentially, the latter approach would allow a sentencer to increase the term of the sentence to reflect the fact that it has been suspended.**

**What are your views on this division of opinion? Would it sometimes be appropriate to extend the term of the sentence to reflect the fact of its suspension? (Q13)<sup>50</sup>**

Most of the respondents focused on the substantive issue of whether it is appropriate to extend the term of a suspended sentence to reflect the fact of its suspension, but it is also relevant to note that some respondents commented on the respective judgments of the High Court in *Dinsdale*, with M7 saying 'I honestly don't think that [the majority position] applies here, to our *Sentencing Act*'. J4 considered that 'as soon as you get into that sort of debate about do you fix the term and then you look to suspend it or you don't do that, I think that's not right, that's not how we do it', also saying that 'I respectfully think that that dichotomy in the High Court is a good indication of how far removed the High Court is from the trial court' Finally, M5 undertook a detailed analysis of the majority and minority judgments and concluded that the majority and minority positions were 'consistent on the issue', with both leaving 'open the possibility that you can decide length of a suspended sentence without it necessarily being of the same length that you would give if it weren't suspended'.<sup>51</sup>

As to the issue of extending the term of the sentence, respondents fell into one of the following three groups: that it is wrong in principle to do so; that this would pose difficulties in relation to breaches; and that it is permissible to do so, albeit only to a small extent.

For some, it is altogether wrong to extend the sentence. M8 considered that this would 'cut across proportionality', while M2 felt that 'then proportionality becomes difficult', adding, 'I'm an intuitive sentencer, so if I think something's worth six months, it's worth six months whether I'm suspending it or not'. Three magistrates spoke about 'the temptation' of increasing the length of the sentence, with M9 saying

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<sup>50</sup> See [2.5.2] for discussion of the position in Canada, where the Supreme Court has declared that a conditional sentence need not be of the same length as the sentence of incarceration that would otherwise have been imposed. For data on the lengths of suspended and unsuspended sentences, see [4.3.2.1].

<sup>51</sup> For discussion of the Western Australia decision of *Duong v Western Australia* (2006) 32 WAR 246 on this point, see [2.2.2.2].

‘I don’t think I have ever consciously done it’, while M10 would ‘work to avoid the temptation’ and did not agree in principle with increasing the term. According to M3, ‘it may be that whatever the minority in *Dinsdale* said is that they do it that way, but I don’t. [Although] it might be subconscious that you’re doing it’. J1 thought the process might be a conscious but not articulated one, stating that ‘you could do it here in your own mind and nobody would necessarily know that you’d done it’, but that in fact, ‘your head sentence figure shouldn’t change...it doesn’t make logical sense to extend the term simply because you’re suspending it’. Two magistrates regarded this approach as ‘dishonest’ (M3; M7), while M8 also questioned the point of doing so, stating, ‘I don’t know what you would be trying to achieve there, except to invite more ridicule on your head. To indicate that a suspended term of imprisonment is a feather duster. It’s a feather duster whether it’s 10 months or 30 months – and it’s a bigger feather duster!’

For others, the key issue was having an excessive sentence in the event of activation on breach. J2, for example, said ‘you always have in mind that the sentence may still have to be served so you can’t impose too harsh a sentence’, while for J6, such a power ‘would come back to haunt us when they came back before us for breaching it’, with a sentencer potentially ‘deeply regretting’ imposing the original term. M6 similarly spoke of having to ‘look down the track and if the person breaches it, they have received a more serious penalty than was otherwise deserved’. In the alternative, M1 pointed out, ‘you look like you back down all the time... I like to impose suspended sentences where if they come back before me I wouldn’t have much hesitation in giving it to them’. M10 admitted to imposing a longer term ‘in the odd case’ but went on to say ‘thank heavens for the discretion to resentence on breach proceedings, because I often find myself thinking, when it comes to the crunch, you’re no longer worth six months, you’re only worth two or three’. For M5, although ‘it’s going to come back before you and you have the opportunity to reduce [the sentence] a little’ in the event of breach proceedings, the question at the time of sentencing is ‘is that appropriate? Does this person deserve that sentence?’

Finally, a handful of judicial officers acknowledged that they do at times extend the term of a sentence – albeit only to the extent of minor adjustments. J5 concluded that ‘at the end of the day, I don’t agree that 12 suspended equals six in. If I’m going to go down that path, I’ll...give you part[ly suspended]. What I’m not going to do is give you twice as much because you haven’t gone in’. M10 sought to avoid the temptation to increase the term, but qualified this by saying that ‘there might be the odd case where, without thinking about it, you’d in fact impose longer on a suspended, simply in the course of deciding what a reasonable length of suspended imprisonment would be’. For J3, this would particularly be the case with short sentences, since ‘one purpose of a wholly suspended sentence is to mark the significance of the crime and a suspended sentence of two months doesn’t mark anything, whereas an actual sentence of two or three months does’. M5 similarly spoke of ‘rounding up’ a short sentence, as follows:

I look at the sentence that I impose...and there is the question of ‘does that send the message that I want it to send’? There is in that context a temptation to round it up, so that it’s more punchy and it has more force and more impact. And of course often



we're imposing relatively short periods. You might otherwise have...looked at six weeks, but you might be tempted to say two months for a suspended. But that doesn't mean that it's not in range. Two months, six weeks, it's totally appropriate and it's a question of judgment call and I think there is in that very narrow sense a temptation to round it up...to give it more impact. Now whether you would then have given that same person two months in is tricky, because obviously it's going to have an immediate effect and there might be reasons then to reduce it down because they can get six weeks leave from work and they're not going to lose their job and of course you don't have to take into account those considerations if you're giving a suspended sentence.

J4 in turn stated that 'it is wrong to increase a term, knowing that you're going to suspend it', but went on to say that:

every now and then you come across a case where you intuitively feel that it is right to jack it up a bit because he's got really strong compelling circumstances why he shouldn't have immediate imprisonment but...it's a very serious crime...So I would without saying anything jack that one up a bit and I wouldn't be able to justify it other than saying it's an intuitive process and I feel that it's right.

M4 also spoke of giving 'a little bit around the edges, a little bit longer', going so far as to say that 'anyone who says that they haven't taken the latter approach probably is not being utterly frank'. Quantitative analysis exploring this issue further is presented in Chapter 4.

#### 3.4.3 Application of the principles

In this section, the practical application of these principles is explored by analysing respondents' answers to questions about the kinds of cases where a suspended sentence would be appropriate or inappropriate and their use of combination orders.

##### **What sort of cases would you regard as most appropriate for the imposition of a suspended sentence? (Q4)**

Several types of offence or offender were nominated in response to this question,<sup>52</sup> with some respondents stating that it would be inappropriate to restrict the availability of suspended sentences to specific categories of either. This finding is echoed in the draft conclusion of the TLRI that 'there is no need to restrict the use of suspended sentences in the case of serious crimes'.<sup>53</sup>

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<sup>52</sup> Note the suggestion that magistrates 'rearrange the facts to fit the types of sentences they use habitually. It may be said rather than "seeking a punishment to fit the crime", magistrates, through selective interpretation, "seek an offender to fit the punishment": Hogarth, n 42, 299. A recent study of cases where the offender was on the cusp of being sentenced to custody found that in such cases, 'it was clear that sentencers were casting around for some reason to avoid a custodial sentence...In a sense, therefore, the process of sentencing of cusp cases can become a search for hope – even a glimmer of hope – that can justify a non-custodial sentence': Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison*, Prison Reform Trust, London (2003), 39.

<sup>53</sup> TLRI, n 34, 27. Note that 'almost all' appellate judges in a Canadian focus group study asked this question were opposed to restricting the availability of conditional sentences to certain offence types, which they regarded as 'representing an unwarranted intrusion by Parliament into the exercise of judicial discretion': Roberts and Manson, n 16, 1. Notwithstanding this objection, recent legislative amendments in Canada will preclude the imposition of conditional sentences for a range of specified offences: see [2.5.1]. See also [2.2.2.3] for Australian offence-based restrictions on the availability of suspended sentences.

Judges nominated a range of circumstances where they would regard a suspended sentence as appropriate. Youthful offenders were nominated by four judges as being most appropriate for the imposition of a suspended sentence,<sup>54</sup> with J3 adding first offenders<sup>55</sup> and offenders who have ‘demonstrated that they’ve changed their ways’.

J6 felt that an appropriate case would be ‘minor trafficking [or] possession of cannabis with some of it for sale’.<sup>56</sup> J5 suggested a suspended sentence would be most appropriate in cases ‘where there hasn’t been permanent physical or psychological harm to the victim. It’s a lot easier to suspend the lot where you’ve just started on your violence...or you’ve harmed but I think the victim hasn’t been that traumatised’. Perhaps in a similar vein, J1 nominated the situation of ‘a 22 year old who has a sexual relationship with a 14 year old girl with the approval of her family and everything else, but it’s a crime’. According to J6, however, serious injury to the victim will not preclude the imposition of a suspended sentence, suggesting that:

A good example is wounding in a hotel bar with a beer glass. That’s always a problem when someone receives a terrible wound on the face but the offender has never been in trouble before or has hardly been in trouble before. I want to signify the seriousness of the crime but I don’t want to put the offender in prison for a first offence.

J1 considered a range of factors which would make suspension appropriate, explaining:

I wouldn’t necessarily restrict it to a type of crime. I would think more to the whole set of circumstances because someone can commit [something] which in isolation and on the face of it is a very serious crime but there may be circumstances not only relating to how it was committed or the circumstances in which it was committed but the personal circumstances themselves which might then lend themselves to a suspended sentence... It’s case-by-case, but I guess what I identified before – if you have a youngish offender who might not have a great deal of history and has committed a fairly serious crime and there are fairly good prospects that it’s not going to be repeated. It might have been committed in particular circumstances that [are] probably not going to reoccur in the future. It’s more the circumstances of the offender that might lead me to it.

Magistrates were more likely to nominate types of offences rather than circumstances relating to the offender. The most commonly nominated type of offence amongst magistrates was driving while disqualified or drink driving, with six referring to such offences,<sup>57</sup> while another spoke about dangerous driving or negligent driving causing death. M2 said ‘repeat drink driving cases are from my perspective one of my main targets for suspended sentences of imprisonment. I have a feeling that a certain percentage of the community don’t view that offending as criminal behaviour’. M4 similarly suggested that suspended sentences were ‘a bit of a wake-up call’ which

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<sup>54</sup> For discussion of the relevance to youth to the decision to suspend, see [5.3.1.3]. For analysis of the relevance of age to reconviction and breach rates, see [6.4.3.4] and [7.5.4.3] respectively.

<sup>55</sup> See [4.3.6.2] and [5.3.1.1] for discussion of the use of suspended sentences for first offenders.

<sup>56</sup> See [4.3.6.1] for consideration of the use of suspended sentences for drug offences.

<sup>57</sup> As set out in [4.3.6.1], exceeding the prescribed content of alcohol and driving under the influence of alcohol/drugs together accounted for 30% of wholly and 28% of partly suspended sentences imposed in the Magistrates’ Court.

‘hits home’ in such contexts. ‘Serious’ dishonesty offences, including stealing from an employer and Social Security fraud, were also mentioned by four magistrates. M7 said that a suspended sentence could be appropriate in instances of violence, citing a case where two young men with no priors for no reason ‘got drunk, wandered around town...set upon a couple of other guys, beat them to a pulp...and I gave them a wholly suspended sentence as a message not only to them but to the community at large’.

Two magistrates suggested suspended sentences would be appropriate for first offenders. In contrast with the judges, the youth of the offender did not appear to be a major consideration, although one magistrate listed the offender’s age as one of the relevant factors, together with

**M9:** their family set-up – whether they’ve got support, they’re in a relationship, they’re married, they’ve got kids. Whether they’ve got the supportive network behind them, whether that also gives them the incentive to stay out of jail. I also look at the effect on the victim of the offences. It may well be, for example, it’s a theft, they may have repaid the money.

**LB:** So, restitution.

**M9:** Yes, that’s a factor. A big factor, actually, in keeping somebody out of jail immediately. It might have been a violent offence and it may well be that the violence did not cause a great deal of harm to the complainant...Whether it was a spontaneous offence, no premeditation, they didn’t sit down and plan it, it just happened, those sorts of offence, if they were committed like that, are less likely to reoccur than if they involved a lot of premeditation.

M7 advised that ‘you don’t go through a checklist and tick it off as to why you are doing this. Generally there’s got to be something that really is persuasive as to why you [suspend], that positively persuades you’, while M5 spoke of the situation where ‘the person needs a clear message that their conduct is serious and unacceptable. So they haven’t got that message yet and you want to give it to them’.

**Can you give an example of a case where, in your view, a suspended sentence would be the only appropriate penalty? (Q4)**

When initially I drafted this question, I was aiming to see if there was consensus as to a clear case of a ‘classic’ suspended sentence, where no other sentence could be regarded as appropriate to fulfil the various principles of sentencing. It quickly became clear that the question was ill-conceived, because, as J5 noted ‘that’s too wide a question’, while J1 pointed out ‘I’m not sure there’s any such animal’. In my interviews, I therefore revised this question by prompting respondents to think about where it would cause the most grievous injustice if suspended sentences were removed from the sentencing hierarchy. What emerged from the responses was that suspended sentences are filling a vital role in the sentencing hierarchy and there is strong support in both courts for their retention, although there was no unified response about the kind of case where suspended sentences are most needed as a sentencing option.

In such a context, J3 nominated ‘offenders who are impecunious, so you can’t give them a fine, and who are unsuited for a community service order: so you either give them no penalty or imprisonment’,<sup>58</sup> reiterating that in Tasmania, ‘we have a very small range of penalty options’ and that it would ‘be an appalling thing’ to abolish suspended sentences. J6 likewise bemoaned the fact that ‘we don’t have another sentencing option, which might be weekend detention, home detention...we just don’t have those options. And another problem is that the number of hours for community service is extremely limited’. J4 in turn suggested that a youthful offender with no priors and good prospects who had committed a relatively serious crime would be ‘a classic’ for a suspended sentence and declared that ‘if we couldn’t do it anymore, that would be a loss, a real loss’.

Several magistrates also said they couldn’t nominate a case for me where a suspended sentence would be the *only* appropriate penalty, but agreed that removing suspended sentences would create problems. M1 suggested that abolishing them would ‘either force people into prison or force people out’ and that where someone is convicted of a serious matter but because of their personal circumstances shouldn’t go to jail, one would have to consider ‘is a CSO an appropriate penalty for such a serious crime? You devalue the crime and then you think, no, we can’t go there, well, then we’ve got to send you to jail’. M4 confirmed that suspended sentences are ‘definitely fulfilling a role because there’s a gap in options’, while M2 also reflected that ‘unfortunately there aren’t enough...sentences that we can impose. We don’t have weekend detention’, suggesting that a ‘classic one’ for a suspended sentence is

an 18 or 19 year old youth of impeccable record who’s been involved in a very bad car accident through negligence and caused significant injury to someone. The driving has to be condemned but at the same time you don’t want to imprison this person of 18 with a reasonable future...with an actual term.

M5 suggested ‘a young offender who commits an offence as a consequence of immaturity or the negative influence of others’ who had been dealt with leniently in the past ‘so they need a message, which is – you are on the brink of going to jail’, also saying that a stark example would be where

the offence can be regarded as a one-off incident, no risk of repetition...[and] they accept totally the wrongfulness, contrition etc. [Plus] factors which led to it have been addressed or will be addressed, for example, drug addiction...and the other factor would be the impact of imprisonment would be devastating to the individual or counterproductive for their social or occupational well-being. Those kinds of considerations. I think once you have those kinds of crimes, you’re in a position where you can’t avoid a prison sentence, but reasons to suspend are just compelling.

It follows from the foregoing discussion that there is no single case where a suspended sentence could be regarded as the only appropriate penalty. Although judicial officers may lean towards particular sentencing dispositions for certain types of cases, each case will be decided on its merits and it will generally be a number of factors which will determine whether a suspended sentence is imposed.<sup>59</sup>

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<sup>58</sup> See [5.3.6] for discussion on the propriety of imposing a suspended sentence in such circumstances.

<sup>59</sup> See further discussion in [5.1].

**Are there any circumstances that would make a case particularly inappropriate for a suspended sentence? (Q5)**

Most respondents suggested a suspended sentence would not be justified where the offence type was serious, although each sentencer's definition of a serious offence will of course differ. In particular, two judges nominated murder,<sup>60</sup> while J1 suggested that a suspended sentence would not be appropriate for 'the more significant sex crimes and crimes of violence...but even there, there are circumstances of an offender which might suggest that a suspended sentence might work'. Similarly, M8 felt that 'it's obvious, in the case of rape or intentional bodily harm [but] because you've got to respond to each case on its own...I can't predict what's in or what's out'. J5 suggested that sometimes 'there are elements of criminality involving the victim where you don't even go there', and furthermore, 'you know that if you don't jail, there's an outrage and you've probably caused more harm than you've saved anyway because the next person's going to get a bigger flogging. Or you weaken the trust in the system'. M4 spoke of cases 'where, in the interests of personal deterrence, general deterrence, just every sentencing principle indicates an actual prison sentence'. Interestingly, at the opposite end of the spectrum, M4 reiterated that a suspended sentence would be inappropriate in 'any case that doesn't deserve a prison sentence', while M1 suggested that using them in minor cases would devalue the sentence.

There was also a very strong view that a suspended sentence should not be given to a recidivist, especially one who has had suspended sentences in the past and ignored or breached them.<sup>61</sup> Three judges and six magistrates mentioned this factor, although M3 qualified this by noting 'that's not saying you can't give multiple suspended sentences'. J6 reported being surprised 'when somebody with a long prison record comes before me and I see that in recent times a sentencer has imposed a suspended sentence and I wonder why...For me, one suspended sentence is the only chance that should be given'.<sup>62</sup> M2 also said that where an offender has 'shown no ability to engage with the rationale of a suspended sentence...I've often said to people, look, courts don't often give people two suspended sentences'. In such cases, M6 felt that where 'chances offered by the court in the past to rehabilitate/deter had failed, the court is backed into a corner by the offender and the offending behaviour and nothing short of a term of imprisonment is going to satisfy a proper sentencing decision'. J4 also said that:

when you look at records you quite often see that in the Court of Petty Sessions, someone who's got quite a history, he gets a suspended sentence, offends again and

<sup>60</sup> See [4.3.6.1] and [5.3.2.1] for discussion of the use of suspended sentences in murder cases.

<sup>61</sup> Although many expressed this view, the practice would appear to be somewhat different. When gathering data for the reconviction study in Chapter 6, I examined the prior sentences of 229 offenders who received a wholly suspended sentence as their index sentence. Of these, 39 (17%) had received a wholly suspended sentence in the two years preceding the index sentence, with nine receiving more than one such sentence in that time. For discussion of offenders receiving further suspended sentences after breaching a suspended sentence, see [7.5.2].

<sup>62</sup> It is interesting to note that statistical analysis of the data in Chapter 4 confirms that J6 imposes fewer suspended sentences than most of his colleagues.

surprise, surprise he's back in your court shortly afterwards. And of course we're always told he'll never do it again, he's got a pregnant de facto, is going to be a good father and all those promises but after you've been on the bench for a while, you say, I've heard that before.

M7 would be loath to suspend 'where there is utterly no remorse. Where there is virtually no prospect of rehabilitation. Where you really feel the person deserves jail as their just deserts'. Finally, M9 considered suspended sentences inappropriate for 'people with mental illness, I usually am reluctant to set people up to fail when I know that in all probability they'll be back before me in two or three months to breach them and then I'm really not going to have much option but send them to jail'.

The above comments would seem to suggest that an unremorseful recidivist who has committed a 'serious' offence will not generally receive a suspended sentence, but even in such cases, responses to other questions suggest that judicial officers may be inclined to suspend where the offender has strongly mitigating personal circumstances. Chapters 4 and 5 expand on this discussion by presenting details of offenders and offences who are most likely to receive a suspended sentence, while Chapters 6 and 7 consider the types of offenders who perform best on such sentences.

**It has been suggested that suspended sentences can be especially useful for certain offenders, for example, those with substance abuse issues, mental illness or gambling problems. What are your views on this issue? (Q10)**

Some chose to answer this question in general terms, while others addressed each of the three categories, as discussed further below. The question was criticised by some for being 'very broad' (M4) or 'too complicated' (J5). M8 was 'not sure you can sort of classify as being appropriate in relation to specific classes or specific offences. You've got to always respond in the circumstances of a particular case', while J4 pointed out that 'about 90% of our clients have one or all of those things!'

Five magistrates were concerned that imposing a suspended sentence on such offenders would just set them up for failure 'so you're sentencing them [to prison] by default – just down the track' (M7). M6 was also worried about the longer term effects of such a sentence, which 'can look really bad on the record...and that can colour the penalty that is imposed for subsequent offences'.<sup>63</sup> Accordingly, such a sentence would be appropriate

only if they're otherwise deserved, bearing in mind that to impose a suspended sentence tongue in cheek is a very dangerous mechanism, because it means you are potentially sentencing a person to a term of imprisonment that is not deserved. If you are wanting to encourage a person to be subject to assessment, 'treatment', there are other vehicles for doing that.

Several respondents raised the issue of needing support in place for such offenders. M3 mentioned that for offenders with substance abuse issues 'we can link [a suspended sentence] in to orders for probation'. J1 said:

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<sup>63</sup> For discussion of the effect of a prior suspended sentence on subsequent sentences, see [4.3.6.2].

if I were going to impose a suspended sentence in any of those categories, I'd do it because I'd been told that there was something available in the community to help the person with their particular problem. I think there's a fair lack of facilities available in a structured way to provide that help...if there were structured help available for persons in those kinds of categories, then I'd be more inclined to use it.

M5 was somewhat more optimistic about the situation, mentioning the Board of Exceptional Needs in the Youth Justice Division, and suggesting that by imposing a suspended sentence, 'you can actually engage with these various agencies, bring together housing, education, etc'. Unfortunately, this would only work if 'the resources are there in the community, and if they fall away, then the order can be totally ineffectual'.

#### **Substance abuse**

Three judges spoke about substance abuse issues, with J3 ordinarily unwilling to impose a suspended sentence 'unless there was clear evidence reform was on the way. Not on a mere statement of intention'. J1 also wanted to see 'some indicia already that they're dealing with it'. M4 would 'probably want to hear that they were on the path to rehabilitation anyway', adding 'if there's a glimmer of hope...a pre-sentence report that says, look, they have turned the corner, they want to give up drugs or substance, they want help', then 'there is a role there for suspended sentences, whereas a few months in jail will just set them back'.

Two magistrates, by contrast, did not favour suspended sentences for such offenders because they considered them 'more likely...to go on offending' (M10) and felt that 'they're not going to reform themselves' (M1). J6 also stated that 'generally speaking, I don't have much sympathy for substance abusers...[none] at all for the ones who burgle or steal because they need funds to feed their habit', but would have regard to the offender's addiction 'if it makes them do some bizarre thing...where it may have influenced unusual or odd behaviour'.

J1 commented on the support options available to substance abusers and suggested that one might impose a suspended sentence 'because you've been told they've applied to enter the Bridge program, they've been accepted, they're able to go subject to their not being put into custody in two weeks down the track. But we have absolutely no control if two weeks down the track they don't go'. This view highlights the need for better information about and enforcement of orders, a point echoed by two magistrates who spoke enthusiastically about the NSW Drug Court model.<sup>64</sup> M9 suggested that it was 'a good idea' to have a suspended sentence 'while

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<sup>64</sup> Tasmania is currently the only State in Australia yet to pilot or establish a drug court within its jurisdiction: Victor Stoeckski, *The Establishment of a Drug Court Pilot in Tasmania*, Tasmania Law Reform Institute, Research Paper No 2 (2006), [3.1.1], however magistrates were recently granted the power to impose drug treatment orders: see [1.2]. As noted by the TLRI, a key similarity between drug treatment orders and a Drug Court is the provision for ongoing supervision of orders by the court and the capacity to impose a series of ongoing rewards and escalating sanctions depending on offender progress: TLRI, n 34, 73. For further discussion on sentencing options for offenders with drug addiction issues, see [5.3.1.5].

For discussion of the experience of specialist Drug Courts in Australia, see eg Arie Freiberg, 'Australian Drug Courts' (2000) 24 *Criminal Law Journal* 213; Arie Freiberg, *Sentencing Review: Drug Courts and Related Sentencing Options*, Department of Justice, Melbourne (2001); Bronwyn

they're having treatment, [then] bringing them back, having reports on them and that sort of thing, and then ending with a sentence, but suspended, because they've come through their courses'.

#### **Mental illness**<sup>65</sup>

J6 said 'I am loath to sentence somebody who suffers from some incapacity which makes it hard for them, life hard for them, and not offending hard for them, and I don't think actual imprisonment is going to help them, or society, at all'. J3 agreed but saw scope for using a suspended sentence 'as a pro-active tool. In other words, conditional upon you doing so-and-so – which they are unwilling to do'. M4 also saw a role for suspended sentences for an offender who 'compl[ies] with all those people giving them guidance on their mental illness'.

M10, by contrast, felt that such offenders were 'less likely to be able not to re-offend even if they're otherwise inclined to comply with the conditions', but reported having 'reasonably frequently combined extremely strict probation conditions, typically involving a really hands-on approach by forensic mental health services and had mixed results but sometimes it's worth trying'. M9 also considered such offenders particularly easily led into crime 'through no fault of their own, because of

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Lind et al, *New South Wales Drug Court Evaluation: Cost-effectiveness*, NSW Bureau of Crime Statistics and Research, Sydney (2002); Ruth Lawrence and Karen Freeman, 'Design and Implementation of Australia's First Drug Court' (2002) 35 *Australian and New Zealand Journal of Criminology* 63; Karen Freeman, *New South Wales Drug Court Evaluation: Health, Well-being and Participant Satisfaction*, Bureau of Crime Statistics and Research, Attorney General's Department (NSW), Sydney (2002); Arie Freiberg, 'Drug Courts: Sentencing Responses to Drug Use and Drug-related Crime' (2002) 27 *Alternative Law Journal* 282; Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2003) 20(2) *Law in Context* 6; David Indermaur and Lynne Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15(2) *Current Issues in Criminal Justice* 136; David Indermaur and Lynne Roberts, 'Finding Alternatives to Imprisonment: Drug Courts in Australia' (2005) 86 *Reform* 28; Arie Freiberg, 'Problem-oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196; Jason Payne, *Specialty Courts: Current Issues and Future Prospects*, Trends and Issues in Crime and Criminal Justice, No 317, Australian Institute of Criminology, Canberra (2006) and Stocevski, *ibid*, Part 3.

For international developments, see David Wexler and Bruce Winick (eds), *The Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, Carolina Academic Press, Durham (2003); Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-Based Adult Corrections Programs: What Works and What Does Not*, Washington State Institute for Public Policy, Olympia (2006) and John Hepburn and Angela Harvey, 'The Effect of the Threat of Legal Sanction on Program Retention and Completion' (2007) 53 *Crime and Delinquency* 255. Note also the findings of an English study that 'almost all respondents, including tabloid readers adopted liberal positions on the issue of drug crime and felt strongly that drug users should be treated rather than punished': Rethinking Crime and Punishment, *What Do the Public Really Feel About Non-Custodial Penalties?*, Esmée Fairbairn Foundation, London (2002), 4.

<sup>65</sup> Also note that the Magistrates' Court is currently running a pilot Mental Health Diversion List Program, presided over by Deputy Chief Magistrate Hill. For details, see Tasmanian Magistrates' Court, *Mental Health Diversion List - Procedural Manual*, Hobart (April 2007). Mr Hill advised me following a meeting about the program that as at November 2007, 39 offenders had been assessed for the list, of whom five were deemed not suitable and eight had been finalised, with 26 still progressing. He added: 'Perhaps also worth mentioning is the positive effect that the process has had on compliance with treatment and attendance. The feedback we are getting from case workers and relatives of the defendant is very positive': Email from Deputy Chief Magistrate Hill to Lorana Bartels, 6 December 2007.



their problems, their disabilities’, adding that it is ‘really difficult to deal with...people with cognitive disabilities’.

***Gambling addiction***

Three judges indicated that they would not be likely to impose a suspended sentence for an offender with a gambling problem, although two said they might where there was clear evidence that the offender had already taken steps towards reform, for example ‘to repay some of the money’ (J2). M9 regarded gambling problems, like substance abuse, as being quite amenable to treatment, while M10 noted that ‘most gamblers I get have got their treatment before they come to court’ and in this context,

you’re often dealing with a first offender who’s offended in a very serious way, and because they’re a first offender not likely to repeat their offending, you’re anxious to avoid actually sending them to prison although the offence clearly requires a sentence designed to deter in the community generally.

The discussion in this section demonstrates a certain ambivalence to the use of suspended sentences for these kinds of offenders. This issue is explored further in Chapter 5.<sup>66</sup>

**How do you regard combination orders, ie attaching CSO, probation, supervision or fines to a suspended sentence? (Q9)**

There are arguments for and against the use of combination orders: on the one hand, it gives additional bite to the suspended sentence and may fulfil a rehabilitative role. On the other hand, it runs the risk of increasing the tariff, while also devaluing the suspended sentence in its own right.<sup>67</sup> The responses to this question revealed considerable support for the use of combination orders amongst judges, with J5 reportedly ‘lov[ing] them’, while J3 saw them as ‘absolutely crucial’, adding,

I really favour combination orders because I think it’s important to have...a penal aspect to a sentence, very much for general deterrence reasons. I don’t think it’s at all good, going back to the youth situation, for them to wander back into the school, where everyone knows what they’ve done, and for them to say they got no penalty.

J4 suggested currently using more combination orders than in the past, ‘partly because of the perception of the public that a suspended sentence alone is not an adequate punishment. I tend to agree with that, an offender should be given some form of immediate punishment for the crime’.

Three judges suggested that fines are of little utility because of the offender’s inability to pay the fine, although J2 felt they could be ‘appropriate for white collar offenders, especially ones who are not able to do community service’. Three judges also referred specifically to the benefit of combining a suspended sentence with community service, although there may be scope for greater communication by

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<sup>66</sup> See [5.3.1.5]-[5.3.1.6].

<sup>67</sup> For further discussion, see [1.5.5.1] and [2.2.4]. Note however the TLRI’s proposal to remove the option of combining a suspended sentence with a community service, probation or rehabilitation program order: TLRI, n 34, 32.

Community Corrections about the practical operation of these orders,<sup>68</sup> with J5 stating:

I don't know how CSOs work on the ground anymore, I know you're out there cleaning up something or other, community organisations or whatever. I don't know enough now about how CSOs are working on the ground and so perhaps I am using them as an afterthought or as an alternative. I don't think I'm using CSOs in a positive sense.

Combination orders were also well received by most magistrates, being described as 'worthwhile' (M7), 'useful' (M1) and 'essential' (M1; M2). Whereas few of the judges referred specifically to probation orders or supervision by a probation officer, this was mentioned by six magistrates. M2, who was strongly in favour of combination orders, suggested that although in some cases the offender has 'the ability to do it on their own' and could therefore be left 'to their own devices', these cases were in the minority. M9 spoke of the benefit of coupling lengthy operational periods with probation, arguing that 'if I'm suspending a sentence for, say, three years, that's a long time for some of these people and they might need a bit of help. Certainly probation in the first twelve months will set them in the right direction'. For M10, 'a very high percentage' of suspended sentences would also be combined with probation, adding that these go 'hand-in-hand...because a probation order is going to make it more likely that the suspended sentence will work, whereas the other penalties, community service and a fine, are imposed for different reasons'. As M6 put it:

If I impose a suspended sentence I would frequently...incorporate a probation order with that, because both orders are to some extent serving the same end of rehabilitation. They act in aid of each other, the probation order providing on the ground assistance, hopefully, to the offender, in order to render the suspended sentence more efficacious, not forgetting of course, that a probation order itself can be a punitive order...My usual package for a suspended sentence would be...in combination with a probation order, which might have attached to it special conditions as to alcohol assessment and the like and the only pecuniary element might be, say, a compensation order, in order to try to redress the harm done to a victim.

Several magistrates criticised the use of fines in combination with a suspended sentence. M9 observed that 'the vast majority haven't got any money anyway...You're setting them up to have more financial woes, really, by doing that'. M6 suggested that 'to throw a fine in for good measure might be counterproductive, if not excessive'. M5 agreed, saying, 'I would almost regard it as diminishing the impact of the suspended sentence. It's sending two different messages', although this was qualified somewhat in the context of drink driving offences 'because a fine is usually the penalty that is imposed, absent an actual jail term, and people would be expecting a fine'.

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<sup>68</sup> To this end, it was recently recommended that the government in the United Kingdom 'should require judges and magistrates to have ongoing training and first-hand knowledge of the community sentences, programmes and projects used in their jurisdictions': *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison*, Esmeé Fairbairn Foundation, London (2004) (*Crime, Courts & Confidence*), 56.

Finally, M8 reported never using combination orders because ‘I don’t like fiddling with too many sentences’, adding:

if you want to impose a suspended sentence, why would you want to attach a CSO to it, or a fine or something? If that was so, then you wouldn’t impose the suspended sentence. If you’re going to impose a suspended sentence for 12 months, where would you fit a community service order of 150 hours? It’s just irrational. Because either the head sentence was appropriate in the first place – if it was appropriate in the first place, then why are you qualifying it with a whole lot of other considerations? It seems to me a bit like an expression of desperation.

**Are there certain types of cases where this is especially appropriate or inappropriate? (Q9)**

J6 suggested that a combination order would only be appropriate ‘when I feel that they must suffer some form of immediate punishment’, whereas J3 thought ‘it’s nearly always appropriate. I think it should always be looked at’. Three judges conceded that adding community service and fines would not always be appropriate, with J2 adding ‘in these circumstances a wholly suspended sentence [*simpliciter*] will be imposed even though I would have preferred a combination order’. J2 also thought it was ‘probably [not] necessary to attach a further penalty for the bloke caught selling pot, if he has a good record’.

For J4, a combination order would be particularly appropriate for ‘young at-risk offenders’ who don’t have much of a record but a poor background ‘and he’ll need the support of a probation officer because he hasn’t got the family background’. In other cases, however, ‘the nature of the crime might be such that he’d really be better combining the suspended sentence with community service because that will...every week bring home the reminder of it’. On the other hand,

where it’s a pretty serious crime but because of age and lack of priors you don’t need anything else, you’re set. Mum and Dad are in the back of the court, they’ve not got a family history of trouble, they’re very supportive, he’s gone back to uni to do his studies or something like that, I don’t think you need to. So it’s the cases where the support’s not there, you need the probation officer. If the support’s there, then I’d say it’s inappropriate to overwork the poor old probation service, because you’re acutely conscious of their caseload.

M3 suggested as a ‘classic’ for a combination order which can satisfy both punishment and rehabilitation, as well as making the offender more acceptable in the community, ‘the youth that was involved in a serious accident and perhaps even causing death...and I sometimes put in orders there that ask the probation service to link them up with the ambulance service’. On the other hand, M4 considered that in most instances of negligent driving causing grievous bodily harm,

most of those people are not offenders in the sense of being recidivists, they’re just normal people who happen to have had a bad day driving and they’ve injured somebody very badly... A suspended sentence, together with a disqualification of driving, is going to be sufficient rather than loading them up with community service orders and probation.

M5 similarly regarded a combination order as inappropriate ‘where you can truly regard it as a one-off, and for that particular individual, a suspended sentence is a very serious outcome’, adding that:

combination orders are more the exception than the rule and more often I would impose simply the suspended sentence, because...if you give the right message about that outcome, the person should go away really understanding that they've had a very serious sentence imposed upon them, not just today but potentially they're at risk for that time. ...You've got to think, this person could end up serving that sentence and is it fair that they should get all these other orders as well?

Instances of repeat drink driving also drew conflicting responses. M4 suggested that it may be appropriate to impose both community service and probation with a suspended sentence for a fifth or sixth drink driving 'where there's an alcohol problem ...a suspended sentence may not quite be enough without that added imposition of community service orders to make him work for it and he needs probation to try and help him fix up his alcohol [problem].' M6, by contrast, felt there would be no need for probation for a repeat drink driver with a job who is 'apparently happily married' because '[t]hey don't need anyone's help, they just need to have the fear of God put into them. A suspended sentence for your white collar offender is usually enough to bring them to their senses'. M1 also thought that for 'someone who's got a good job, is working, doesn't have a drug or drink problem and is intelligent, well, they don't need CSOs or probation', while M2 said the same would apply to 'mature age people, perhaps an opportunistic theft from an employer or something', where the offender might have a gambling addiction there, but there were indications that it was under control and 'they've taken some steps, they've got some counselling'.

On the other hand, according to M6, a combination order would be appropriate

in the case of dishonesty, particularly where the offender is a young person. It could also be appropriate in the case where you have a person who has a lot of recidivism and you sense that that person is on the brink of being rehabilitated or has shown a reasonable period of trouble-free activity, and you think that this might just be a period of aberration that could take people back to bad ways. [Also] the person who has a long history, frequently occurs in my experience, where something's happened in the person's life and that has been very reformative and constructive for them, but they've stepped off the straight and narrow temporarily.

As noted above, M8 does not use combination orders, while for M7, 'these days, I tend to impose a global penalty. Because in a way, if an offender is facing multiple charges – multiple complaints and numerous charges – I think it's better that the message that's given to the offender is a straightforward and clear one'. M10 was reluctant to generalise, saying 'I find it difficult to categorise in terms of assault or drink drive or whatever', adding that it would just be an assessment of the individual and the previous pattern of offending, if any, which would determine this issue, rather than any particular category of offending. M9 similarly stated: 'I wouldn't say there are ever cases where I wouldn't do it. There are cases where I don't think it's appropriate, but that's because of the particular circumstances and I wouldn't lay down hard and fast rules where it's inappropriate'.

As discussed in Chapter 2, it is impermissible to impose a suspended sentence in combination with a fine for assault under the *Police Offences Act 1935*.<sup>69</sup> M9 referred

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<sup>69</sup> See [2.2.4].

to this restriction, as did J3, who described it as ‘one of the stupidities we have in our *Police Offences Act*’, arguing that it would be preferable to be able to impose a suspended sentence coupled with a fine in such instances. The use and effectiveness of combination orders is considered further in Chapters 4 and 6.<sup>70</sup>

#### 3.4.4 Information and communication

In this section, I examine the judicial officers’ views on the flow of information about suspended sentences to offenders and the community and consider the different positions on the importance of a judicial officer explaining the reasons for suspending a sentence and the effect of so doing to an offender.

##### **To what degree do you think it is necessary in your comments on passing sentence to set out the factors which led you to the suspend the sentence? (Q6)**

Ancel states that traditionally, judges were required to specify and explain in detail the facts and circumstances leading to the decision to suspend.<sup>71</sup> Although there is no legislative requirement in Tasmania for the court to give reasons for imposing a particular sentence, there has been a long-standing practice in the Supreme Court to make comment ‘outlining at least some of the reasons for the orders made’.<sup>72</sup> Chambers J in *Conlan v Arnol*<sup>73</sup> considered it ‘most desirable that where a sentence of imprisonment is imposed and in the case of all serious offences (irrespective of penalty), a court should announce some reasons for its decision, however shortly expressed they may be’. Although it has been suggested that such remarks should not be read as if they were reasons for judgment, and should not be analysed with too critical an eye,<sup>74</sup> their potential to promote transparency and judicial accountability is beyond dispute.<sup>75</sup> It is in this context relevant to note Mackenzie’s comment, following her interviews with members of the Queensland judiciary, that:

with the constant criticism of the courts in the media, both in terms of public accountability and the perceived lack of sensitivity of the court to victims, it is important that the courts do whatever is possible to communicate the reasons for a particular decision, in a language that is understood by all parties. Without sufficient

<sup>70</sup> See [4.3.4] and [6.4.4].

<sup>71</sup> Marc Ancel, *Suspended Sentence*, Heinemann, London (1971), 30.

<sup>72</sup> Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (2nd ed, 2002), [2.508]. In its draft Report, TLRI does not recommend enacting a legislative provision requiring courts to give reasons for short sentences of imprisonment: TLRI, n 34, 8.

<sup>73</sup> *Conlan v Arnol* [1969] Tas SR 194 (NC 9). See also *Shrubsole v Rodriguez* (1978) 18 SASR 233, 235-236; *DPP (Vic) v Josefski* (2005) VR 85, [30] (Maxwell P) and *Curtis v The Queen* [2007] NSWCCA 11, [4] (McClellan CJ at CL). Note also *Cross v Police* [2001] SASC 47, where Olsson J stated that where a substantial custodial sentence is contemplated ‘even if it is to be suspended, then it is imperative that a sentencing magistrate express, at least in note form, sufficiently adequate reasons to disclose how the sentence is arrived at and what factors have been taken into account’: [24] (Emphasis added). Although these remarks relate to a sentencing magistrate, they are of course equally apposite to a sentencing judge.

<sup>74</sup> *R v Sherlock* (Unreported, Tas CCA, Green CJ, Chambers and Nettlefold JJ, 28 August 1975).

<sup>75</sup> See Fox and Freiberg, n 29, 24; Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (4th ed, 2005), [11.3] and Edney and Bagaric, n 44, who go so far as to suggest that ‘Reasons for a decision are a central aspect of a legal order’: [2.4.3]. For further discussion of the need for judicial officers to provide reasons for sentence, see [3.4.4], (Q6) and [5.4].

### 3. Interviews with judicial officers

communication by judges of the reasons for sentence, there is greater room for misunderstanding of the sentencing process in general, particularly by the general public.<sup>76</sup>

I found the judges were evenly divided on this question. J6 regarded it as 'an important function to explain your sentences, to give your reasons in your comments on passing sentence' while J1 said that there was 'probably every reason to do it', adding, however, 'I'm not sure that everyone necessarily does...I would normally do that. I would certainly try to [but] I wouldn't promise that it happens every time'. J5 declared:

Every sentence I've handed down has been...handed to the offender before they leave the court. By writing it down, I've got to get a structure, I've actually got to get some thoughts together. I've actually got to slow myself down from that immediate gut response...I think it's necessary that everyone in the courtroom goes away at least knowing what I did and why...The community at least has access to what it was I did and why I did it - and more *why* I did it – the better the response.

The other three judges, however, did not actually regard it as important to explain their reasoning when suspending a sentence. J3 considered that this was 'not particularly significant. In most cases it's just self-evident,' while J2 stated:

I generally don't do that. I think my sentencing comments generally follow a bit of a formula – I generally refer to the charges, the facts, the victim impact, the circumstances of the offender, particularly the mitigating ones, and then I might say a little to the effect that it's a serious offence but having regard to the mitigating factors that I've referred to, I don't think it's so serious as to impose a sentence of imprisonment so I usually would not say much more than a few words referring to the weighing up process as to the seriousness of the offence and the mitigating circumstances.<sup>77</sup>

Similarly, J4 said:

Generally speaking, I'm not a great one for elaborate reasons for passing sentence because it is after all an intuitive judgment and if you set out the essentials and in this context, it would be 'but having regard to the fact that you're only youthful, you have no previous convictions, and your dad's got you a job somewhere else', that would be sufficient and I think that if we go into more elaborate reasons, pages of it, it just ends up with more appellate work and more scrutiny and upset when it is an intuitive process anyway. I know other jurisdictions give more elaborate reasons, it's not our culture down here and I think it works.

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<sup>76</sup> Mackenzie, n 2, 26, citing Justice Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121, 132. Cf the view that it is 'generally thought inappropriate to require a judge to give reasons for his choice of sentence': Ashworth et al, n 8, 60. In that study, the authors found that a small minority of judges said they usually avoided giving an explanation of the sentence because they felt they sometimes reached the right conclusion for the wrong reasons: 54.

For discussion of the importance of providing reasons and an explanation of the sentence to victims, see Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 35 and Julian Roberts and Kent Roach, 'Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis' (2005) 9 *Queen's Law Journal* 560, 591-2.

<sup>77</sup> Note that this statement is internally consistent with the interpretation above that J2 does not adopt the *Dinsdale* two-stage approach.

The magistrates were much more in favour of express reasons. This is somewhat surprising, given that magistrates deal with a much larger number of matters in any day, and their COPS are not currently made available on the internet for the benefit of the general public. On the other hand, the vast majority of sentences they impose are non-custodial orders, and there may therefore be a stronger desire to enunciate relevant factors in the more serious cases. It is also important to remember that although magistrates would less commonly impose sentences higher in the sentencing hierarchy, due to the volume of their sentencing practice, they would impose many more such sentences overall.<sup>78</sup>

All but one magistrate spoke of the importance of taking this step, with M9 suggesting that it is ‘a strong factor’ and ‘incumbent on us...to say why we do it’. M3 regarded it as ‘an obligation between you and the defendant’ while M5 felt it to be

of critical importance for the offender to understand that they were at risk of an actual jail term. And that this is potentially an actual jail term. And also why you decided to suspend it in this particular case, because if they don’t understand that, they may well feel that a suspended sentence is the appropriate outcome for that crime, regardless of their circumstances, which is promoting their re-offending. So it’s almost a matter of personal deterrence that you should be setting out very clearly the reasons why you’re suspending it so that if they do re-offend they’re not expecting that outcome again the next time around.

The only magistrate not to share this view, M1, regarded it as somewhat impractical to do so because ‘we’re not like judges, we might deal with 20 matters, chop chop chop, it’s pretty standard stuff’. Accordingly, ‘I just might say, ‘I’ve considered sending you to prison, however I’ve taken into account your good record, that this is your first time’. Very superficially ... I’m the sort of person who makes a decision and gets on with it’, a view which would seem to be at odds with the notion that each offender should be treated as an individual.

#### **How do you attempt to communicate the significance of a suspended sentence (as a sentence of imprisonment) to an offender? (Q7)**

Pursuant to section 92 of the *Sentencing Act 1997*, when the court imposes any order with conditions attached to it or which requires an undertaking from the offender, the court is required to explain the purpose and effect of the order, the consequences of failure to comply with it and the process for varying the order,<sup>79</sup> although section 93 provides that failure to perform these functions will not invalidate the order.

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<sup>78</sup> Between 1 July 2003 and 30 June 2004, judges imposed between 30 and 84 custodial sentences each, with a total of 339 custodial sentences. Of these, 35% were wholly suspended (119 sentences). Magistrates imposed between 44 and 225 custodial sentences each in the same period, giving a total of 1,713 custodial sentences, 60% of which were wholly suspended (1,028 sentences).

Note that judges may be comparing practices with other jurisdictions, where reasons are generally more elaborate, whereas magistrates may be comparing suspended sentence cases with cases where they impose a non-custodial sentence.

<sup>79</sup> Similar provisions apply in other Australian jurisdictions either generally or specifically in respect of suspended sentences: see *Crimes Act 1914* (Cth), s 20(2); *Criminal Law (Sentencing) Act 1988* (SA), s 9; *Sentencing Act 1995* (WA), s 34; *Sentencing Act 1995* (NT), s 102 and *Sentencing Act 1991* (Vic), s 27(4); *Crimes (Sentencing) Act 2005* (ACT), s 12(4). Section 95 of the *Crimes (Sentencing*

The ALRC has recently recommended that Federal sentencing legislation should provide that when sentencing an offender who is present at the sentencing proceedings, the court must *itself* give an oral explanation of the sentence at the time of sentencing; and a written record of the explanation if the offender requests it or the court is of the opinion that it is desirable in all the circumstances to provide the offender with a written explanation.<sup>80</sup> Where the offender is not present, it is proposed that the court may delegate this function, although it is suggested that the court should consider the need to make any order to satisfy itself that the explanation has been given.<sup>81</sup>

The judges were more likely than the magistrates to see the significance of a suspended sentence as something that was readily apparent and did not need to be communicated at length. J2 said ‘usually I don’t, but sometimes I’ll say words to the effect that if you get into trouble again, you can expect to serve the whole of this sentence, plus another sentence for what you do in the future’. J3 would similarly sometimes explain the ramifications of a breach, but considered that ‘in the main, it’s one of those things ...offenders understand very acutely’.<sup>82</sup> J4 reported saying words to the effect of ‘I’m giving you this one opportunity. If you offend again in the next two years, you’ll come back before me and you’ll certainly go over to that door behind you and over the river to Risdon and not out the public door with your family. Do you understand me?’, adding ‘they always say yes’. J6 ‘wouldn’t have thought it was that difficult to understand... but quite often I will say to them, “this is your last chance, so and so, you understand don’t you?” and I get them to nod’, adding that

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*Procedure) Act 1999* (NSW) relates to the explanation to be given upon imposing a good behaviour bond which attaches to all suspended sentences. Somewhat surprisingly, although the Queensland legislation requires an explanation to be given to the offender in respect of a probation, community service or intensive correction order, it does not do so with respect to suspended sentences: *Penalties and Sentences Act 1992* (Qld), ss 95, 105, 116.

<sup>80</sup> Australian Law Reform Commission, *Same Crime, Same Time*, Report 103, Canberra (2006) (ALRC), Rec 13-3.

<sup>81</sup> *ibid*, [13.35]-[13.61]. See Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper 70, Canberra (2005) for reference to an offender who made a submission that he was given incorrect information about his recognizance release order by his barrister, to whom the judge had delegated the task of explaining the effect of the order: [13.33]. See also discussion in Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30, Sydney (2006), [5.151]-[5.165] and Rec 26.

It is in this context also relevant to note the decision of *Hill v Police* [2002] SASC 28, [16] where Perry J suggested that ‘it is important that the sentencing magistrate, with the authority of the court, should inform the defendant in clear language of the significance of a suspended sentence and the consequences of breaching the bond’: [16]. His Honour considered that it would not be ‘best practice’ to delegate the task of explaining the decision to another person. Cf *R v Friend* [2004] VSCA 76 and *R v Lynch* [2004] VSCA 173. See also *R v Schofield* (2003) 138 A Crim R 19 (NSWCCA), [166].

<sup>82</sup> Cf the position that offenders going to prison ‘do not need to be provided with information about prison life in advance; they are informed of institutional regulations on arrival, and correctional officers are ever-present to ensure that rules are both understood and obeyed. A Conditional Sentence is quite different in the respect that offenders need to have a clear sense of the nature of the order, its conditions, and, most importantly, the consequences of violating those conditions’: Julian Roberts, Lana Maloney and Robert Vallis, *Coming Home to Prison: A Study of Offender Experiences of Conditional Sentencing*, Department of Justice, Ottawa (2003), 6.



although this is designed to get the message across, 'I wonder whether it makes any difference because they must understand what a suspended sentence means'.

Two magistrates spoke of imposing a sentence of imprisonment and then having 'the pause' before going on to announce that the sentence was to be suspended,<sup>83</sup> with M8 suggesting that 'generally it's the process of announcing the sentence, that you would hope to impress upon them what it is'. M4 felt that 'in a lot of cases there is absolutely no need to lecture them about "this is a real sentence"' because 'normally they are just so acutely aware that they are in a position where they're borderline going to jail or not...the defendants are very savvy, most of them'. Nonetheless,

in every case, I say 'now, for the next two years, if you are found offending in this way, you will serve *x* months in jail, do you understand that?'...I look them in the eye and tell them that they've been very lucky in this case – well, not lucky, but you know, sometimes I do – sometimes I say, 'another court may have ordered that you serve part of this sentence in jail. I've decided, because of a), b) and c) that it's not necessary but do you understand the position that you're in? You have three months jail hanging over your head for three years.' They're sort of shivering and shaking...

M7 also reported making a strong statement about the likely effect of a breach, as follows:

I say 'you have not escaped punishment here, it is a punishment, it is a term of imprisonment. The fact that it has been suspended does not mean you have gotten away with it. Believe me, if you come back before me again in breach of the terms of the suspension, I for one don't believe in making idle threats, I believe in making threats that I can implement, put into effect, and if you come back, you will go to jail'. Clear as that.

M9 would explain the consequences of breach to an offender and then asks if they understand that, and 'if they say no, I'll run through it again...And I make sure that they understand it before they sit down'. Especially with a sentence with a number of elements attached to it, M6 would also 'ask the offender if he or she understands the order which I have made', reporting that '[m]ost people say yes, which is either because they're not prepared to say no or I've been particularly lucid in what I've said to them'. In this context, it is illuminating to consider the findings of a Canadian study which interviewed offenders on a conditional sentence, where several participants said

they would have liked to have heard more from the judge at sentencing regarding the order that he or she was imposing. When asked why they had not asked any questions in open court when given a chance to speak, one provided a simple explanation: '*you're not going to question a judge when he's letting you go free*'.<sup>84</sup>

M5 would 'explain [the sentence] at the end in terms appropriate for the particular offender', adding that 'in all cases I would emphasise the consequences of the breach and...how they may be in breach of their sentence', and in some cases,

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<sup>83</sup> An English Crown Court judge similarly said in the context of a drug treatment and testing order that 'it's all a bit of drama and showmanship but I like to think that you're impressing something...that they are frightened of the consequences of breaching': Hough, Jacobson and Millie, n 52, 50. See also David Tait, 'Sentencing as Performance: Restoring Drama to the Courtroom' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002).

<sup>84</sup> Roberts, Maloney and Vallis, n 82, 7.

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I might say to a person who's almost delighted that they've got away without an actual jail term is 'the worst thing you can think when you leave court today is that this sentence is over. This sentence is just starting. It's in place for 12 months. You must be of good behaviour for 12 months. It's hanging over your head for 12 months from today'...The explanation is very much tailored for the particular individual and the particular case. And there are those cases where you – let's take the mother of two who's committed the offence of death by negligent driving who you're absolutely satisfied that she's terribly contrite, it's a one off offence, she's never going to repeat it, all of those considerations. You won't give that kind of robust, really in-your-face kind of explanation because for her a suspended sentence is a sentence that carries a great deal of stigma, she understands that, but you would always take care to explain the consequences of a breach.

M2 spoke about telling an offender that:

I've taken into account these following factors, your employment, your mother's just died, whatever the factor is, that tells me that there is some potential in him that he won't re-offend. And to give him a chance to keep his job and his relationship, I'm going to say to him, 'ok, for a couple of years, you're not going to go to prison, but it'll be there if you don't do the right thing. And you've got to take responsibility for not doing the right thing and accept that it's on your terms if you break the suspended sentence and go to prison – [you] can't blame anyone else for it'. And it's an acceptance of responsibility, but also him knowing the good things that he's got going for him, he can take some pride in those things, so he's not all bad, so he gets some impression that someone thinks he can do it.

There was an awareness of the potential for condescension in any interchange with an offender. M10 spoke of offenders who 'might be a bit slow on the uptake' where it would be necessary 'to spell it out in words of one syllable'. M3 also said:

I try to explain it without being patronising – it's difficult sometimes because you do sound patronising and I suppose you are being patronising – but without being patronising or being too familiar, explain that they really have gone close to going to prison and use it as a persuasion that they shouldn't come back here again.

The foregoing comments show a variety of judicial styles when imposing a suspended sentence. Roberts has also commented on research 'demonstrat[ing] that offenders report that being treated as an individual is one of the most important determinants of "going straight"'.<sup>85</sup> In this context, it is of interest to note that a study by Tait of NSW Local Court offenders found that one of the factors which impacts on recidivism is 'magisterial style' and that 'offenders who feel they were treated fairly and could have their say were less likely to re-offend, regardless of what action or penalty was imposed'.<sup>86</sup> Furthermore, Tait found that whereas with prison sentences, it was likely that the sentence itself would have the more profound impact on the offender's life, 'with less intrusive penalties the less tangible issues of magistrate style and defendant satisfaction with the court process could come in'.<sup>87</sup>

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<sup>85</sup> Roberts, n 76, 100.

<sup>86</sup> David Tait, *The Effectiveness of Criminal Sanctions: A Natural Experiment*, Report to the Criminology Research Council, 33:96-7, Canberra (2001), 30.

<sup>87</sup> *ibid*, 30.

**Do you think there are any ways of improving the court's communication with offenders in this regard? (Q7)**

J6 said 'I think they understand very well what it means. I've never had one come back and say they didn't understand'. Several judges referred to the fact that an offender would be too 'stressed out' (J2) or 'petrified' (J4) while the sentencing comments were being delivered for much to register. Then, J3 suggested, 'once they know they're not going in to prison, they don't pay attention. Their mind's gone to something else'. J3 also considered that because offenders receive a memorandum of sentence, this 'saves you going through it in precise detail', while J4 attempted to resolve the lack of focus by ensuring the offender received a hard copy of the COPS 'so hopefully when the panic of the moment's died down, they can read it and consider it'. J5 also provided hard copies of the comments to offenders and thought 'the answer of how to make it better is obviously to spend more time on the sentencing process. But we don't and can't'. J1 added that communication with an offender was a matter of 'personal style', suggesting that it is 'very useful to talk to an offender direct', whereas the COPS 'are very formal and to some extent you lose the direct communication with the accused', adding:

Because we're obliged to consider a number of factors and if you don't refer to a number of factors, you're very well likely to end up being appealed because you haven't considered something, so you try to be careful to refer to the factors that you're supposed to refer to [and] it tends to get a bit like something of a screed you're reading from, as opposed to just talking to an offender.

This tension between the need to simultaneously communicate with an offender and any court of appeal, as well as the media and the public, was considered by J2, who said:

I try not to use formal language when I'm speaking to people in the dock but it's very hard to speak in words of one syllable, especially when from one point of view I'm concerned to be very precise in what I'm saying in case there's an appeal against sentence. More often than not, I'm reading out the comments on passing sentence and they're carefully polished comments that I've dictated here in my chambers with the intention that they'll be handed to the media so that they won't get it wrong when they report it, and that's not just for the benefit of the offender. I mean the modern way of doing justice in public is not so much to have the door of the court open to anyone who wants to wander in, but to put the comments on the internet.

In contrast with the judges, who appeared to be fairly satisfied with, or at least accepting of, the status quo, many of the magistrates were keen to improve in this regard, with M1 suggesting that a 'standard set of words to say' might be of assistance and that 'the more information you can set down, the better'. M3 similarly felt that 'if we can learn to communicate better, then all the better', as well as stressing the need to be culturally appropriate in communicating with offenders. M10 talked about the 'constant battle to keep our communication understandable, and I've got no doubt that we fail a lot of the time', and because 'we're lawyers, we use too many words that are too big!' M2 also pointed out that 'when we're appointed as magistrates or judges, we don't get a lot of training or instruction about how to deal

with people',<sup>88</sup> but suggested that 'you can positively engage with a defendant' and convey that 'they're not a number'. Accordingly,

it may be that if we change the way we deliver our sentences in some cases, in the appropriate ones, we ought to get a little more excited about what's going to happen down the track...what's that going to do to his job and his family and his prospects for promotion and all this sort of stuff if he goes to jail now – and push his concentration to his future.

M9 raised the possibility of preparing an information sheet to be given to offenders to explain

what a suspended sentence is and the various mechanisms by which, if they breach it, they can be brought back to court, and the options then that are available if they are brought back to court. So that they have it with them. But how many of them would keep it or throw it in the bin outside, who knows? But I suppose it's something which could reinforce what you say. But I think it's up to us, it's incumbent on us, as the judicial officers doing this, to tell the people, to explain it to them. Ask them whether they understand.

M5 had also considered the desirability of an information sheet, but likewise concluded that 'you can probably have more impact by delivering a message that can be tailored to the individual at the time', adding however that

there may be some room for a video or some kind of educative tool here that follows up on the message the Court's given, because that piece of paper they get, the Memorandum of Sentence, the suspended sentence and all the conditions, it's not a particularly appealing document...I think probably more can be done...[but] it's got to be accurate and I think probably the magistrates and judges do as much as it's appropriate for them to do in court, and then if you're talking about outside court, it obviously has to be absolutely accurate and correct and reflect the order that's been made...I think it would be useful if unrepresented people had a chance to ask somebody questions. Somebody attached to the court, a court officer or something like that...The other problem is that the media downplay the significance of a suspended sentence, so you can get another message going out there to people and potentially offenders which may be undermining the message that the court is sending out in that particular case.

#### **3.4.5 Public opinion and the media**

Some of the comments in the previous section advert to the complex relationship between the courts, offenders, the public and the media. As discussed in Chapter 1, there has been considerable discussion in recent years about the role of public opinion in sentencing, with research indicating that suspended sentences are not regarded as a serious penalty by the public. In this section, I examine sentencers' views on the role of public opinion in relation to suspended sentences, and especially consider the role of the media in shaping that perception.

#### **What do you think public attitudes are to suspended sentences? (Q14)**

Five judges considered the public to have a low opinion of suspended sentences, with three judges saying the public regarded them as a 'slap on the wrist'. J2 thought 'they

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<sup>88</sup> For discussion of the need for judicial education, see Chief Justice Murray Gleeson, 'The Future of Judicial Education' (1999) 11 *Judicial Officers' Bulletin* 1 and Chief Justice Peter Underwood, 'Educating Judges - What Do We Need?' (2006) 7 *The Judicial Review* 423.

don't see them as any punishment at all', while J5 suggested they left people 'rolling around on the floor laughing, or they're compelled to write to the newspaper or ring up the talkback radio show'.<sup>89</sup> Most of the magistrates also thought the public saw suspended sentences as 'a joke' (M7), 'a bit of a let-off' (M1), a 'soft option' (M2; M10), or 'no penalty (M6) or held them 'in low regard' (M4). M2 suggested that 'when I go around to the community and talk about rehabilitation and talk about community based dispositions, you're lucky to get away with your life!'

J3, by contrast, said public attitudes to suspended sentences were 'mixed. I think many thinking people see the wisdom of them. There's a very wide range of views about'. M8 also felt that 'in Tasmania people are remarkably accepting of judicial response, I think, that's my impression. I could be wrong but most people don't sort of stop you in the street and [shout at you]'. As an interesting example of the mixed responses which a suspended sentence may engender, one judge described a case of a female teacher who received a partly suspended sentence for having a sexual relationship with boys at her school, reporting that people's responses varied from the punitive to incredulous that such an offender would be required to serve time in custody since 'the boys must have loved it'.<sup>90</sup> Accordingly, 'the bottom line [is] you're not going to be able to satisfy everyone out there. They're all going to be looking at it from a different perspective, and depending on that perspective, you'll have a different view of a suspended sentence'.

**Do you ever consider the impact a suspended sentence may have on public opinion?<sup>91</sup> If so, does this influence your decision-making? (Q14)**

As discussed in Chapter 1, a recent Australian survey found almost two-thirds of respondents thought that 'judges should reflect public opinion when sentencing'.<sup>92</sup> The following comments demonstrate the tension for a sentencer between doing justice for the individual and being responsive to the perceived needs of the public. A recent English study of sentencers found that:

It was not uncommon for sentencers to talk of public opinion having a role, but a necessarily limited role, in sentencing decisions. For example, it was suggested that

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<sup>89</sup> See also Hough, Jacobson and Millie, n 52, where it was noted that 'there is particular skepticism among the public about the value of community penalties, which are typically viewed as a "soft option" or "cop out". This point was vigorously expressed in a majority of the magistrates' focus groups': 53-4.

<sup>90</sup> See [1.5.2.1] for discussion of the response to the suspended sentence imposed on a Victorian school teacher in similar circumstances.

<sup>91</sup> See Roberts, Doob and Marinos, n 13, Q27. Interestingly, the authors there found that judges who had imposed more than 10 conditional sentences 'were somewhat less likely to report taking public opinion into account. This rather paradoxical outcome may be explained by the fact that high users believed in the new conditional sentence, and were inclined to use the new sanction regardless of the impact on public opinion. Or, consideration of the response of the public inhibited some judges': 20. In the present context, it is not possible with a response pool of only 16 to conclude whether there is any correlation between experience and the considering of public opinion, but the fact that judges were more likely to do so than the magistrates would seem to suggest the opposite finding to the Canadian research.

<sup>92</sup> David Indermaur and Lynne Roberts, 'Perceptions of Crime and Justice' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report*, UNSW Press, Sydney (2005) 141, 153, discussed in [1.5.2.1].

public opinion should ‘inform’ but not ‘constrain’ sentencing (senior judge); that it “is something we can’t ignore, but [shouldn’t] be the be-all and the end-all” (Crown Court judge); that a sentencer should consider public opinion but not be ‘swayed’ by it (district judge); that public opinion is a small but not a major factor.<sup>93</sup>

There was a great divide between the courts here, with eight magistrates of the view that public opinion was irrelevant to the task before them and did not influence their decision-making, while all the judges appeared to consider public opinion of significance to their work in general, although not in individual cases.

J2 asserted that ‘in a sense all of our work is done on behalf of the public’, adding: ‘I sentence having regard to the public, the offender and the CCA [Court of Criminal Appeal], so yes, the public’s opinion is relevant, but it’s only one of the factors’. J3 also acknowledged ‘certainly I think about it and I suppose the fact that I think about it must impact, but it never knowingly impacts’, while J6 was not influenced ‘in a particular case’ but suggested that ‘if there is a sufficient uproar over a period of time concerning the level of sentencing for some particular crime, I am sure it affects the severity of sentences’. J5 also admitted to having become more punitive in response to public attitudes, saying, ‘do I ever consider the impact a suspended sentence may have on public opinion? Yes, and it has influenced me’, adding however that he still didn’t give offenders as much as the public or victim wants, since ‘that’s not the task [the public] set me. You didn’t set me to be the front row of the lynch mob’<sup>94</sup>

M9 said it was ‘not relevant to me what the public think’ and M4 also felt that public opinion ‘genuinely...plays no role at all’, conceding that ‘I can envisage the media cases where one day there might be one which is so borderline and there are gangs of media that I might, I will be influenced, but I haven’t yet’. For M5, ‘informed community views about that crime’ should be taken into account in reaching a decision, but not ‘that the media is present when you deliver your sentence and that they may present your suspended sentence in a way that looks as if there is really no meaningful sentence being imposed...That’s just of no impact whatsoever’.<sup>95</sup> As to what amounts to ‘informed opinion’, M6 observed:

Should we be conducting some kind of census as to what public opinion is? Do we read letters to the editor? Do we read outraged editorials? So once we start to walk down this whole track of public opinion, one would need to divine it in a way that was useful and I think we would be on a very slippery slope indeed...public opinion is a difficult horse to ride so I prefer to not stay in the saddle.

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<sup>93</sup> Hough, Jacobson and Millie, n 52, 55-6. In this context, it is significant to note that Roberts has recently suggested that in England and Wales, ‘there is no real clarity with respect to the legal relevance of public attitudes’ and ‘public opinion is not a legally recognised factor at sentencing’: Julian Roberts, ‘Sentencing Policy and Practice: The Evolving Role of Public Opinion’ in Arie Freiberg and Karen Gelb (eds), *Penal Populism: Sentencing Councils and Sentencing Policy*, The Hawkins Press, Sydney (2008) 15, 15-16.

<sup>94</sup> A similar sentiment was recently expressed by an English judge: ‘sentencers should be aware of the public mood but not be “mob-driven”’: Hough, Jacobson and Millie, *ibid*, 56. See also Roberts, *ibid*, who asserts that ‘The era when courts imposed sentence without any consideration of community views has long passed’: 26.

<sup>95</sup> Cf the statement by an English judge that ‘it may be that fear of attracting extremely bad publicity for taking a lenient course means that sentences that pander to that, to a certain extent, are passed’: *ibid*, 27.

The fact that there are differences in considering the relevance of public opinion to judicial decision-making is not entirely surprising, for as the the Chief Justice of the High Court of Australia has noted:

What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with? We live in a multicultural society that takes pride in its diversity. That includes diversity of values. Whose values should we know and reflect? If the values to which we respond are known common values, that is one thing. On the other hand, if different judges respond to different values, does that mean that the outcome of a case will depend on which judge is appointed to hear it?<sup>96</sup>

**The media have described suspended sentences as ‘walking free’, ‘getting off, and ‘avoiding prison’. What, if anything, do you think can be done to improve the image of suspended sentences in the media? (Q15)**

The responses to this question demonstrated a certain sense of frustration with the media. M2, for example, considered that ‘the media need to report fully what the magistrates and judges are saying, why they’re suspending the sentence’. M4 said simply: ‘Well the media could start to report accurately, couldn’t they?’ According to J6, ‘what often goes wrong is that there is a failure to understand the reasons for a sentence. It may be because the media has not fully published them’. M9 similarly noted that:

a lot of [my reasoning] of course doesn’t reach the papers and doesn’t get printed. So all the public see, in a lot of these cases, is ‘X got 6 months wholly suspended’, and they don’t know why and they think, ‘oh, that’s a bit of a slap on the wrist’. And so on. So I think that there needs to be a more accurate and extensive reporting of what we say. But we can’t control what they do. Sometimes the press aren’t even there. What they do is they ring up the registry later in the day and say ‘what happened to X?’ and the clerk will say ‘he got six months suspended’ and that’s all they know, apart from what’s in the complaint, the charge.

M6 summed up the situation as follows: ‘the case took two days, the judge or the magistrate took 10 minutes to sentence the offender and it’s reported in 200 words in the newspaper, the subeditor having destroyed 80% of the court reporter’s copy because it wouldn’t fit on the page!’

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<sup>96</sup> Chief Justice Murray Gleeson, ‘Out of Touch or Out of Reach?’ (2005) 7 *The Judicial Review* 241, 241. Gleeson CJ also observed that ‘[a]lthough some judges speak confidently of community values as though they know what they are, they may be attributing their personal values to the public for rhetorical purposes, and without any substantial basis for a belief that those values are generally shared’: 242. Hogarth had earlier found that ‘[b]efore a magistrate is likely to be influenced by the feelings of the community, it is likely that five factors should exist: (i) the magistrate should feel that the public, or at least a significant proportion of it, is interested in what happens in a magistrates’ court; (ii) he should be aware of (or at least have an image of) what the public thinks; (iii) he should define that opinion as significant and a proper consideration in sentencing; (iv) he should feel that the public would like the court to change its practice in some ways; and (v) the difference between the magistrate’s definition of the expectations of the public, and his privately-held views as to the proper course of action, must not be so large that reconciliation between the two becomes impossible’: Hogarth, n 42, 196.

As set out in [1.5.2.1], a national survey is set to commence in 2008 which will measure, *inter alia*, perceptions of crime and sentencing, thereby enabling the judiciary to apprise themselves of contemporary views on these issues.

Several said that ‘not a great deal’ (J1) or ‘probably nothing’ (M8) could be done to improve the perception of suspended sentences, or sentencing generally. M4 was concerned that ‘it may not be what the media do, because you’re not going to stop the media, it’s the type of sentence it is’. J2 said ‘I don’t think we’re ever going to influence the editorial decisions made by editors of the *Mercury*’, while J3 was resigned to the fact that the media have ‘got a legitimate interest in a completely different purpose, so nothing will change the media’. M7 felt that:

in a sense, they’re right...they’re calling it as they see it. And I think the public and the media do see it as getting off...The media’s there to make a story out of something. They’re never going to be interested in reason or logic... I think there will always be a tension between the media and the judiciary. The judiciary is given a broad range of powers and within that broad range they can select a particular response for a particular offender and it’s left to us to do it. The media has a perfect right to comment on what it sees and I just get sick of the media making up stories, but they do, and you’re not going to be able to stop that.

Some commented on the variable ways in which suspended sentences are reported, as follows:

When they want to emphasise the suggestion that someone got a big penalty they’ll report 18 months for so-and-so and not even mention that it’s suspended in the headline, and on the same page, they’ll headline that some one else walked free when they got an identical sentence. (J3)<sup>97</sup>

I remember one I handed down where – the circumstances of the individual were very tragic and concerning, particularly the family situation, and it was his third Social Security fraud breach and the media, unusually, went for a ‘[the magistrate has] been too savage’ line of attack, rather than ‘[I’d] been too light’, which sometimes can happen. (M5)

J4 in turn spoke about trying to influence the way a decision is reported:

I do confess to watching my language with an eye on the *Mercury* when I’m giving reasons...[A colleague] said a few years ago when sentencing a rapist that it wasn’t the worst kind of rape and he got buckets heaped on him. Now, all lawyers would discuss the facts of this case and say, ‘well, it wasn’t the worst kind of rape, look at that one the other day and this one a year ago’ and nobody would take offence but of course ‘Not the worst kind of rape’ was the headline, so [after] all the criticism he got, I’m always careful not to use that kind of language. And I also sometimes beef up the language, like ‘this was a very wicked act’ and ‘it’s difficult to imagine a more serious crime’ with a view to getting that message to the public and taking the emphasis off the fact that I’ve suspended the whole of the sentence because of antecedents.

Several respondents were optimistic about the potential for educating the media more overtly. M4 suggested that the media should be educated ‘to remove references and headlines such as “walking free”, “getting off” and “avoiding prison” and to report that they’ve received a prison sentence which is suspended conditional upon them being of good behaviour’. According to J4, the media ‘cut and paste from those comments, so the reporting is more accurate and for some time now we’ve had very

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<sup>97</sup> This view was echoed by the DPP, who reported that when an offender received a suspended sentence, the media generally reported it as ‘Man walks free!’: Meeting between Lorana Bartels, Tim Ellis SC and Professor Kate Warner, Hobart, 15 April 2007 (Meeting with DPP).



little unreasonable adverse publicity'. This may indeed be part of the explanation for the following observation from M1:

There's two ways the *Mercury* report it. The judges must have someone in PR. When the judges give one, it's nine months, nine months prison. Then when you read down it's three months suspended, backdated...Whenever it's the magistrates that sentence, it's '200 hours CSO for killer' – that's the headline I got when I gave an offender a suspended sentence...Magistrates, when they give suspended sentences, it's off; judges when they suspend it, they don't report the suspending. Well that's just my view, I might be a little jaundiced in this.<sup>98</sup>

Three magistrates discussed the appointment of a media information or liaison officer, with M5 suggesting that it would be 'really valuable' to have someone appointed,

where that person's always available to give information, press releases about outcomes. They can improve the standards of information about suspended sentences. I think the Court has to find its own way of making good information available to the media and to the public that's in a consumable form and is not so difficult and legalistic...A media liaison officer would be an ideal form...[to correct] inaccuracies and miscommunication.

According to M2, such a role would be filled by someone with a legal background,

who can be a front person for the court. Particularly in a high volume court like this, we might do hundreds, or dozens of people a day, the *Mercury* and ABC can't be here all the time, but if we had a person like that who could summarise the important facets – and the *Mercury* could print whichever ones they want, but if they did print, they would print it the way we wanted them to print. Getting it out there and putting the message out there.

This would certainly go some way to addressing the statement by M9 that 'you can't have judges and magistrates going on TV every month and making press statements about these sort of things'. In this context, the comments of Chief Justice Gleeson are again of relevance:

How, consistently with the need to maintain both the reality and appearance of impartiality, can judges engage in public debate about issues of law and justice? Yet, if they remain silent, they are seen as aloof or arrogant, and indifferent to the concerns of the community...It will never be possible, or desirable, for judges to join fully in public discussion of matters of law and order, but there is plenty of scope for improvement in the way in which the system explains itself to the community.<sup>99</sup>

In contrast, J1 said: 'I don't even think that somebody like an information officer would be able to address' the issue of lack of 'control...over what the media actually publish'. One magistrate was similarly concerned that appointing a media officer

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<sup>98</sup> The contrast between the comments of J4 and M1 may also point to a difference in judicial perception and attitudes. Hogarth found in his study that 'magistrates with more punitive attitudes and beliefs tended to feel that public opinion and the press were hostile towards them, while more "reformative" magistrates appeared to define public opinion and the press as being supportive': Hogarth, n 42, 199.

<sup>99</sup> Chief Justice Murray Gleeson, 'Who Do Judges Think They Are?' (1998) 22 *Criminal Law Journal* 10, 15. See also Judge R D Hall, 'A Judicial Response to a Sensationalist Media' (1998) *Proctor* 22 and George Zdenkowski, 'Magistrates' Courts and Public Confidence' (2007) 8 *The Judicial Review* 385, 399, where effective communication was regarded as essential for maintaining public confidence in the courts.

would have little benefit, adding, ‘I’m sorry, but you’re talking to a cynic’, explaining that some years earlier, the Magistrates’ Court had ‘embarked on a deliberate program of facilitating reporting by the media...simply to try to ensure that their reporting was accurate’ and that this attempt to ‘encourage brief but accurate reporting’ failed.

There were three magistrates who wanted to see breach matters reported, although M4 feared that this wouldn’t happen because ‘that’s not newsworthy’. M10 pointed out that ‘they’re hardly ever reported now. I think if they were, then that would have an impact...so-and-so was before [Magistrate X] today on an application to breach a suspended sentence, which was activated’. It was also suggested that the public ‘might be interested to see the statistics, on the number of breaches’, although this kind of information is currently not readily available in a digestible form in Tasmania. Indeed, although the public may be interested in the breach data presented in Chapter 7, the finding that there is such poor prosecution of breaches would hardly enhance public confidence in the criminal justice system.

Many were also enthusiastic about bypassing the media and communicating more – and more effectively – directly with the public. J2 argued that ‘the public needs to be educated about the law at school level and sentencing ought to be explained here’.<sup>100</sup> In line with earlier research,<sup>101</sup> J4 asserted that ‘education solves problems [and] the more the Court can do to explain why it’s making sentencing orders, the better off the Court is’. M9 similarly felt that ‘if the public had all the facts available to them that we have, together with our comments on sentencing, then they might not have the same view’.<sup>102</sup> To this end, three judges spoke in positive terms about the fact that the Supreme Court publishes all of its COPS on the internet, ‘which allows the public to see what we’re doing and get a greater understanding of why we do it’ (J2).

J1 also felt that change would be effected primarily through ‘public forums, explaining what sort of sentences, what they mean and what it’s hoped they will achieve’. J2 explained that ‘a few times a year some judges participate in an adult education tour of the court where members of the public can come in and speak to us and discuss how we approach cases’. Most respondents in both courts reported having participated in community forums on sentencing. In particular, four judges mentioned having attended discussions where ‘we give them the facts and let them be the judges’ (J6). According to J4, ‘whenever we’ve done that exercise, the groups always said “well, we came here thinking the judges are lenient, but now we realise we are more lenient”’. It may be time consuming to attend such discussion groups,

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<sup>100</sup> Note that it has recently been recommended that ‘Education about the criminal justice system should form part of the national curriculum’ in England: *Crime, Courts & Confidence*, n 68, 34.

<sup>101</sup> For a summary of recent research on this issue, see [1.5.2.1].

<sup>102</sup> It is in this context interesting to note the recent decision of the Victorian Court of Appeal which held, when dismissing a Crown appeal against a six month wholly suspended sentence, ‘Assuming that the public were armed with a full understanding of the considerations which informed the judge’s sentencing synthesis in this case, I do not consider that their collective conscience would be shocked to the point that warrants appellate intervention’: *DPP (Vic) v Samu* [2007] VSCA 191, [25] (Nettle JA, Ashley and Kaye JJA agreeing).

and reach only a select and unrepresentative portion of the community, but as M2 stated:

I've stood before Neighbourhood Watch groups all around the state and tried to justify 'but a suspended sentence is a sentence of imprisonment' and they say, but he won't serve it. And they really do get excited about it...[but] if you go through the logical process, saying how you reach that decision, some members of the public are quite comfortable with that process...If you are able to, in language they can understand and appreciate, explain the process to them, and try and get them to shift their focus to include the offender – not exclude the offending but include the offender – and get a more holistic attitude on it, you can get some heads nodding.

**Do you think that the name is part of the problem? (Q15)**

I asked this question in order to ascertain whether there would be support for change in terminology, most likely to the term 'conditional sentence', which is used in Canada, although it refers to a somewhat different sentencing disposition. I gave each respondent a brief summary of the terminology used in Canada and the discussions around the potential use of the term 'custody minus' in England, although this was ultimately not adopted.<sup>103</sup> The responses indicate that any move in Tasmania to alter the name of suspended sentences would likely be met with judicial disapproval.<sup>104</sup>

J3 was emphatically opposed to the proposal, saying, 'I hate the idea of changing names. That's what it is, it's a suspended sentence. I wouldn't dream of changing it', while J6 remarked, 'I think that is pointless. Another 10 or 15 years and we will be changing the name again. Changing the name will make no difference'. There was also widespread opposition in the Magistrates' Court, with only two magistrates supporting the proposal. M7 argued that 'it is in fact a sentence of imprisonment which is suspended on certain conditions, so I would continue to call it a suspended sentence. I think to call it anything else is to try and describe it as something which it isn't'. M6, in turn, suggested that 'most offenders understand what a suspended sentence is...If the media don't understand it, well that's a sad day'.

J4 was the only judge in favour of the proposal, suggesting that '[i]t has a different ring about it altogether. "Judge hands down conditional sentence"... I think that's a great idea, I can't think why I didn't think about it before'. M2 similarly said 'I've never thought of it that way...but my reaction to the conditional sentence is that it might be interesting', while M5 considered it a 'good idea' because

'suspended' doesn't carry with it any connotation that it can be implemented and I think words perhaps like conditional sentence may suggest that you're at risk, in jeopardy of that sentence being imposed. I think that's what's often missing. I think

<sup>103</sup> For discussion, see Julian Roberts, 'Evaluating the Pluses and Minuses of Custody: Sentencing Reform in England and Wales' (2003) 42 *Howard Journal of Criminal Justice* 229, 232; Roberts, n 76, 49-51; Sentencing Advisory Council (Vic), *Suspended Sentences: Interim Report*, Melbourne (2005) (SAC Interim Report), [2.29]; cf [2.44].

<sup>104</sup> See however the submission of a confidential victim that 'The terms "suspended" and "sentences" are contradictory. First, someone is sentenced and then they are not. Either they are sent to gaol or they are not. Which is it to be?': Confidential Victim (Submission 25), Tasmania Law Reform Institute (ed), *Responses to the Sentencing Issues Paper No 2*, Hobart (2002) (Sentencing IP Responses), [1.8].

it's all about public confidence and public information about the nature...and the implications of the order.

#### 3.4.6 Breaches of suspended sentences

In this section I explore sentencers' views on the appropriate means of dealing with breaches. There was a strong desire to see more a proactive approach by the prosecuting authorities and better management of breaches was the area which attracted the greatest level of dissatisfaction with the status quo amongst both judges and magistrates.<sup>105</sup> One of the key findings is that there is currently very little knowledge about the process for monitoring and dealing with breached sentences.<sup>106</sup> In fact, the comments suggest that judicial officers – unsurprisingly – generally infer that offenders who are not brought back for breach have complied with their order, whereas my data in Chapter 7 suggest that breach applications are made in only a very small number of cases of apparent breach.<sup>107</sup> Accordingly, it would seem that judicial officers are currently sentencing on the basis of flawed and overly optimistic assumptions.<sup>108</sup>

#### **Do you receive any information/feedback on the success rate of suspended sentences. If so, what is it and is it adequate? (Q8)**

It quickly became apparent that judicial officers receive no formal empirical information about the success rate of suspended sentences,<sup>109</sup> which J4 criticised, while J6 thought that having such information available 'would be a good idea'. This lack of information is by no means unique to Tasmania. A recent English study found sentencers received no feedback on probation, with the authors finding that '[t]here was general support for the principle of improving feedback, although no real consensus as to whether this should be in the form of information on individual cases, aggregated statistics, or both'.<sup>110</sup> In Canada, researchers described the absence of reliable statistical information about conditional sentencing outcomes as 'sentencing in the dark' and declared that judges should have better information about:

- the level of supervision of conditional sentence orders;
- the 'failure' or 'success' rate of conditional sentence orders;

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<sup>105</sup> It is interesting in this context to note a recent appeal against a statement by a magistrate that 'my experience in this jurisdiction [is] that the breaches are very rarely brought before the court when they should be'. The offender appealed against the unsuspended sentence he received, arguing, *inter alia*, that the magistrate 'erred in fact and/or law in finding that persons in breach of suspended sentences in Tasmania are very rarely brought before the court'. Evans J stated, dismissing the appeal, that it was not an error for the magistrate to refer 'to his experience in relation to the manner in which a breach of suspended sentence was handled': see *Turner v Driver* [2005] TASSC 85.

<sup>106</sup> For details of this process, see [7.2].

<sup>107</sup> See [7.5.1].

<sup>108</sup> This misunderstanding was also noted by the DPP, who commented on the small number of breach applications taken that 'of course that reinforces [the judges'] idea that it's such a great thing to do': Meeting with DPP, n 97.

<sup>109</sup> The lack of information gathered on the use and success of suspended sentences was confirmed by the DPP, who added that his office was 'waiting for a new add-on to our system where we can track these a little better': *ibid*.

<sup>110</sup> Hough, Jacobson and Millie, n 52, 46-7.

### 3. Interviews with judicial officers

- the kinds of non-statutory conditions that are imposed;
- the conditions most likely to be associated with a breach hearing;
- the pattern of judicial response to substantiated allegations of breaches; and
- the recidivism rate of offenders who have served conditional sentence orders (compared to offenders sentenced to serve terms of custody in a provincial correctional facility).<sup>111</sup>

The effect of the lack of empirical information is that sentencers are likely to draw inaccurate conclusions on the basis of their own experience.<sup>112</sup> Although J2 feared that ‘re-offending goes undetected’, J3 regarded the fact that ‘roughly once a year one will come back’ as ‘a fair indication’ and ‘enough information’. J6 in turn had examined the 38 suspended sentences personally imposed over the previous year, of which only two cases had been brought back for breach. J6 regarded this outcome as ‘surprising’, but suggested it was evidence ‘that the system must be working’ adding however that ‘maybe applications are not made in every case of a breach’.

Most of the magistrates agreed ‘we don’t receive anything’ (M1), ‘not statistically’ (M4), while M9 mentioned ‘anecdotal’ feedback, where an offender has ‘got a job and he’s had another kid and going along well’. M2 observed that ‘all we get I suppose is the history of a person when they come up again and we can note whether they seem to have complied with provisions in the past’, meaning that ‘it is difficult to gauge, except in isolated cases, whether the suspended sentence’s motivations are working, because all we’re seeing are the ones that re-offend’. It was also suggested that by virtue of not seeing an offender back before the court, one would assume the sentence had been successful (M7; M10), but M6 acknowledged that if ‘people have not been detected offending, or the police have chosen not to prosecute for a detected offence, then the court will not know about it’.

**Do you think your use of suspended sentences as a sentencing option would change if you had more information about the efficacy of a suspended sentence in each case? (Q8)**

J3 was emphatic that his use of suspended sentences would not change in the face of additional information ‘because I’ve got enough [information]’. However all the other judges were keen to see such information, and most thought it would have an effect on their individual sentencing practice. J2, for example, said ‘if the effect was very different from what I expected and offenders weren’t performing as well it might cause me to reconsider my use of suspended sentences’, while J1 felt that ‘if somebody said, look, you imposed 20 suspended sentences last year and of those 20 offenders, 15 of them re-offended, then I’d be thinking pretty seriously about whether I’d continue to use them’. One judge was uncertain about how much feedback should be given, adding:

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<sup>111</sup> Roberts and Manson, n 16, 18. When judges were asked ‘Of those cases where there might have been a substantial violation of terms of conditions, what proportion have been brought back to court?’, 49% responded that they didn’t know: Roberts, Doob and Marinos, n 13, Q17 and Table 2.17.

<sup>112</sup> The TLRI has similarly observed on the basis of my findings in Chapter 7 that a ‘problem with the failure to bring breach cases back to court is that judges and magistrates get no feed-back on their sentences and little opportunity to develop a feel for the type of offender who typically succeeds and the type who does not. Breach proceedings can provide an opportunity for sentencers to develop the experience to better target this measure’: TLRI, n 34, 30.

### 3. Interviews with judicial officers

**J5:** I'm not sure that I want feedback on every sentence I've given because it might weaken my faith but I wouldn't mind some feedback saying...most them stay clear or, if they've got into trouble, it's because they didn't report to their probation officer.

**LB:** So some kind of aggregate? You know, you gave 20 in 2006, 15 of them went [well].

**J5:** I wouldn't mind looking at that in three or four years time and saying, well, you made a complete dog's breakfast. Or not. And...ones where you gave them partly suspended sentences seem to be working better than where you gave them all suspended or the other way round.

J4 felt that more feedback 'would help the sentencing process' and J6 wanted to have more information but couldn't say whether it would have an effect 'until I know what the feedback is'. Interestingly, J6 suggested that such information might have no effect in respect of young people because of the desire 'to give them that last chance ...so suspended sentences are often a desperate choice, hoping with this one, we will save him or her'.

The magistrates were also keen to see information of this nature and most thought it would have an impact on their sentencing practice, although there was a certain ambivalence about the benefit of this, because of the potential of such information to destroy their faith in suspended sentences and therefore lead to an increase in the use of immediate imprisonment. For example, M1 thought that if the data 'said [suspended sentences] were useless, I'd use them less. If it said they were very good, I'd use them more', while M10 agreed that 'potentially it would [change my sentencing], obviously'. For M3,

I suppose there should be feedback for everything... If it's wrong what I'm doing, then I should be told about it, but at the present time I feel that it's right and if it's empirically shown that everyone who gets suspended sentences within two or three months comes back to court, hold on, I'll start doing something else.

According to M8, such information may change sentencing practices 'for good or ill...I don't know that getting the numbers would help you. Because you might end up imprisoning more people than you'd preferred'. M7 was also somewhat hesitant, stating: 'I suppose I should say yes, although I don't really want to', but acknowledging that reliable and compelling information could change their sentencing practice. M2 thought the feedback would be 'really positive', even though

your faith in suspended sentences might be diminished if you knew that they weren't working. And that's a fair call for a sentencing officer or a judicial officer. There's not much point in imposing a sentence if the odds are it won't work, or won't achieve the result that you want to achieve.

Four magistrates indicated that the information would not have an effect on their sentencing practice, although only M9 was not interested in receiving such information, arguing that because of 'the vast numbers of matters that I deal with, it would be impracticable, really, for me to be getting feedback'. M4 and M6 both thought that being aware of general statistics would not affect whether a particular person should receive such a sentence. M5 suggested that it would be interesting to get an end report on an offender 'but of course that's not consistent with our role, which is of course as soon as we've sentenced, that's the end of our role and we're

not sort of personally involved. We have this arm's length role'. As to the impact of this information,

you can either take a cynical view of suspended sentences or you can take a positive view and I think you have to take a positive view and assume that in many cases they work...I think it would be most unfair to that particular individual to be cynical in your approach to that person and think that because x number of other people don't comply, you're not going to. Everybody should be dealt with as individuals.<sup>113</sup>

**When an offender is brought back to court for a breach, what factors influence your decision whether to order that the sentence take effect? (Q16)**

In asking this question, I sought to determine whether there were common factors nominated by respondents in relation to breach proceedings. Interestingly, there was a difference in the approach taken to this question. Nine out of ten magistrates, but only two of the judges, set out specific factors,<sup>114</sup> while the remaining respondent gave a policy position that they would generally activate a breached sentence.

The following factors were listed as influencing the decision on whether a suspended sentence would be put into effect:

- The nature of the original/breaching offence (J1; J2; M1; M2; M3; M5; M6; M9);
- Time between suspension and breach (J1; J2; M1; M2; M3; M6; M8);
- Evidence of rehabilitation or compliance with conditions (J1; J2; M4; M5; M9);
- The circumstances of and aggravating/mitigating factors on breach (M5; M6; M8; M10);
- Changes in personal circumstances (J1; M1; M10);<sup>115</sup> and
- The sentence imposed for the breaching offence (J2; M2; M4).

Four judges and three magistrates indicated that their general position was that breached suspended sentences would generally be put into effect.<sup>116</sup> J5 would 'more often than not' activate a sentence in its entirety because 'that was the deal. You broke it', although only part of the sentence might be activated where the breach was a case of not complying with the conditions, in which case, 'you'll probably get the same sentence again, you won't get a lesser sentence. But you might get half off [resuspended]'. For one judge, it was 'almost inevitable that it will take effect', adding,

**J3:** I can only think of one instance where it didn't take effect at all.

**LB:** And what distinguished that case for you?

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<sup>113</sup> See [3.4.4], (Q7) above about magisterial style and offenders' perceptions on how they are treated in court having an effect on reoffending rates.

<sup>114</sup> For further consideration of the factors relevant to the exercise of the judicia discretion on breach, see [7.6.2.2].

<sup>115</sup> Note that it was not specified at what point in time these circumstances are to be considered. Cf *DPP (NSW) v Cooke* (2007) 168 A Crim R 379, which specifies that the court is to consider the offender's circumstances at the time of the breach, not at the time of breach proceedings.

<sup>116</sup> On this point, note the observation of the DPP that judges are 'probably living in a false sense of security about it, because they can say, well, it's almost always the case that when the review comes before me, the suspended sentence will be activated', but that he only takes action in respect of serious breaches. He advised me that he did not see it as appropriate to 'wast[e] everyone's time' taking minor matters before the Supreme Court: Meeting with DPP, n 97. For further discussion, see [7.2].

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**J3:** Short sentence and monumental delay in bringing the person back. Youth, minor breach and monumental delay.

**LB:** So for you, activation is the norm?

**J3:** Oh yes, absolutely.

This sentiment was echoed by two other judges on the basis that otherwise the sentence will lose its force, although J6 would relax the rule if there had been only a minor breach of condition or he realised the conditions had been too broad.<sup>117</sup>

According to J4,

there will need to be really strong extenuating circumstances, and I don't listen to all that usual stuff about pregnant girlfriend and deprived childhood because I got all that before. There may be some new particular thing, let's just say, her husband died and she was distraught and depressed and her house burnt down and in the drama of it she got drunk one night and stole some money. Well, that sort of specific thing I might really relax it, but otherwise, you breach it, you go in. Otherwise they lose their efficacy. The word goes around I think. (J4)<sup>118</sup>

M10 said 'I'm a bit sudden death on this. Primarily I look at it from the point of view of – you had your last warning last time, so there's got to be something pretty convincing not to activate it'. M7 and M9 similarly said that because they do not suspend a sentence lightly, they would 'normally' and 'highly probably' activate any breached sentence. M8, by contrast, said 'I start with no presumptions. Every day that I go into that court, I start with no presumptions about anything, and I listen to what's being said'. This approach would seem to be tacitly adopted by the other respondents who listed the factors to be taken into account in determining this issue. In arriving at the decision, M5 refers back to the COPS, which

reveal my thinking at the time...If I've said, this is your last chance, I've got a record of that. And it would reveal whether it was a case where they were just right on the edge of getting actual jail and I was persuaded, just, to give them one last chance, or whether it was a case where, you know, there was an expectation that the future would be problematic but the person was having a go and was really trying.

The issue of the appropriate approach to be taken by the court in breach proceedings is somewhat complicated by the fact that there appears to be a misconception amongst some magistrates about the state of the law in this regard, as set out in the following interchange:

**M4:** I think in the main – the authorities are that the presumption is that it's to be served.

**LB:** There's no legal presumption here. In NSW essentially, there is no—

**M4:** Not a presumption, that might be a bad [term]. Which cases are there here that say that generally—

**LB:** There's not a hell of a lot.

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<sup>117</sup> In this context, the DPP observed that because judges are 'used to dealing with more major crime than what you'd be seeing appended to each and every breach', there may be an initial response of 'what's this doing before me?'. He also suggested that 'the judges wouldn't thank me' for sending every minor matter back for breach proceedings: Meeting with DPP, *ibid*.

<sup>118</sup> It is interesting to note this confidence that offenders would be aware of the judicial approach to breached suspended sentences, with J5 similarly asserting that 'the word by and large goes around the traps'. The data in Chapter 7, however, would give offenders cause to perceive a rather different message, namely that breaches of suspended sentences are rarely prosecuted.



**M4:** Isn't there? I thought there was one.

**LB:** I can't think of one off the top of my head. There's not a strong – there are no statements which are as strong as in some of the other jurisdictions that they –

**M4:** There's not? So it's much more discretionary?

M5 similarly thought that 'the proposition that's outlined in the cases is that, generally speaking, the sentence should take effect' while M1 stated that 'there's a whole lot of law on that'. Even though four out of the six current Supreme Court judges told me their general position that a breached suspended sentence is generally to take effect, there is little recent Tasmanian authority in relation to principles on breach.<sup>119</sup> In addition, the small number of cases actually prosecuted means that there is limited opportunity for such a body of case law to develop. I would therefore suggest that the current differences of approach and confusion amongst some magistrates as to the current legal position point to the need for further judicial or legislative guidance on this issue. As I discuss further in the next section, the TLRI has in fact now gone one step further in proposing the introduction of a statutory presumption of activation on breach.

**Should there be a broad discretion, narrow discretion or no discretion to order a sentence to take effect in the event of breach? (Q17)**

There was overwhelming support for retaining the current position of broad discretion, with only one judge and one magistrate departing from this position. J2 singled out for criticism the Commonwealth restriction 'where it's the whole sentence or a community service order. I don't like that you can't order that part of the sentence take effect'. J4 said 'I'm always a broad discretion person', adding that the situation in Tasmania is different from New South Wales, which 'is such a large sentencing judiciary...so maybe it needs legislative intervention to get some consistency, which we don't need so much here, because we're much smaller, much closer'. For J1, 'if the options are so narrow, why even have it, why not do everything administratively?'

There was also a concern that removing any discretion could work injustice in an individual case. M8 suggested that 'you want as much flexibility as possible, so you can respond. That's what the suspended sentence is all about. To respond in those individual cases where it just would be unfair for someone to go to jail.' M3 was concerned that the removal of discretion would require the judiciary to 'think up ways to overcome the [inevitable] injustices'. This was also a concern for M6, who argued that a broad discretion is essential

because one cannot predict human nature, and there will be circumstances that might call for a re-suspension, for example, that was outside of the ambit of a narrow discretion that might result in an injustice...Of course, judges and magistrates have to assume the responsibility, given a broad discretion, to ensure that a) it's properly exercised and b) there's some consistency between us. But the view that I take on all of these matters, is that once you start strait-jacketing a court, it's only a matter of time before an injustice is going to result and courts will have to start using their ingenuity to get around it. Courts should not be placed in that invidious situation...My starting position is, once the breach has been admitted, my starting position would be this

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<sup>119</sup> See [7.6.1].

sentence is at serious risk of being put into effect...Before finalising that view, [let's] take the lid off the can and look at these other factors. So it is never [that] I need to be persuaded that it should not be executed, I simply say, on the face of it, it's a breach and therefore at real risk of being executed but I'm holding back from any decision until I examine everything.

Several respondents indicated in relation to the previous question that, for them, a breached suspended sentence was almost always ordered into effect. This did not mean, however, that they wished to see their powers legislatively constrained. Two magistrates said that even though their starting position was that the sentence should take effect, this should be left to each sentencer to determine, while J6 added, 'I resist the idea of statutory fetters on sentencing powers'. M10 was 'comfortable either with the way it is, because it lets me do what I think should be done, or with the narrower discretion'. Furthermore, from examining prior conviction sheets, it seemed that 'most of my colleagues and most of the Supreme Court would like to see it left the way it is, because I can see an awful lot resuspended or otherwise altered. But no, I think it's satisfactory the way it is. There'd need to be a good reason to change it'.

As noted above, only two respondents actively preferred a narrow discretion. M4 considered that this approach, including possibly legislating for some of the exceptional circumstances where it would not be appropriate to order activation 'could probably improve the image of a suspended sentence in the public's view'. J5 in turn preferred a presumption in favour of execution, explaining that:

it's quite often that these sort of hearings are lopsided. Because you'll now get from the defence point of view a litany of the incredible good deeds and tasks that they've done...and there's no way the State can meet all of this. All the State can say is you've done two burglaries and got caught...What I sometimes do is I stop the proceedings and say, right, I don't believe any of this, I put him in the witness box. But the problem is, with a wide discretion, at the end of the 'evidence', assertions made at the bar table, it's almost a miscarriage of justice to put the person back in, and that may encourage judges not to put them back in...I'm not sure that we should give too broad a playing field on reimposition. I'd start with the proposition that you go back in, full stop. Now tell me why you shouldn't, instead of 'let's hear all the good things about you'.

Notwithstanding the general lack of support expressed for restricting the discretion on breach, the TLRI has recently proposed that there be a statutory presumption in favour of activation unless the court decides it would be unjust to do so.<sup>120</sup> This proposal would seem to have in principle support from the Department of Justice, which has called for consideration to be 'given to breach automatically leading to the sentence being served'.<sup>121</sup> It remains to be seen whether this recommendation is adopted by the Government. If so, it would serve to clarify the murky legal waters in respect of breach proceedings, but my findings in Chapter 7 suggest that any such

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<sup>120</sup> TLRI, n 34, 31. For discussion, see [2.2.5].

<sup>121</sup> Department of Justice and Industrial Relations (Submission 4), Sentencing IP Responses, n 104.

change would have minimal impact in the absence of more rigorous prosecution of breaches.<sup>122</sup>

**In some other jurisdictions, the court has the power to initiate action in relation to a suspected breach of its own motion. Do you think it would be beneficial for Tasmanian judicial officers to have such a power? (Q18)**<sup>123</sup>

No judges supported this proposal, with most regarding it as inappropriate for a judicial officer to adopt an investigative or prosecutorial role. As J2 said,

We don't prosecute people. We have to be impartial and have to be seen to be impartial. I don't know why we'd get into the business of forming suspicions, but if there were a reason to report something, I'd get the Registrar to get in touch with the DPP. I certainly wouldn't have the Court in any way involved in that.

J4 considered that 'the DPP seems to work quite effectively and I can't see any need for it here', while J5 did not see it as a 'pragmatic option' because 'what are you going to do, go and collect your own evidence?' J1 also pointed out that 'we'd need the support of the prosecuting authorities in any event to be able to do it – there are always issues about the accuracy of the records'.

The magistrates' responses were very interesting because they were informed by the experience of one magistrate who had spent some time working in the Northern Territory where a power of this nature exists, and the issue had clearly been discussed previously. Two magistrates were open to the proposal, although M10 had reservations about it, 'because it makes us prosecutors, but in the recent past the performance of the police in bringing the breach proceedings was so bad that it was making a joke of the sentence'. According to M1,

the court should take control. Some of the magistrates do it *de facto*. I want the people that breach my sentences to be punished. I agonised over it, I gave them what I thought was an appropriate sentence and gave them benefits and if they breach, I want them to serve it...

**LB:** So to obviate that, you'd like to see an express power?

**M1:** Yes, yes...One person [should deal with both the old charge and new charge] and get rid of them both at the same time. It's efficiency, you can impose a better sentence that takes into account totality.

On the other hand, six magistrates did not think it was appropriate for the court to take over what they regarded as an investigative or prosecutorial role, with M3 stressing the impropriety of 'having files about which disclose too much previous information before you've even found a person guilty'.

There was significant support generally for improving the operation of the breach process. Two magistrates spoke of currently taking *de facto* action by alerting

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<sup>122</sup> This point was effectively conceded by the TLRI, stating that '[a]s is clear from situation in Tasmania, the legislative breach machinery has little impact on the efficiency of follow-up. The administrative mechanisms are key and the Institute recommends that these be reviewed': TLRI, n 34, 75.

<sup>123</sup> Although it was not set out in the question, this is the legislative position in NSW and the Northern Territory: see *Crimes (Sentencing Procedure) Act 1999* (NSW), s 98(1) and *Sentencing Act 1995* (NT), ss 43(4A), (4B).

prosecutors to apparent breaches and then adjourning proceedings to enable a complaint to be laid.<sup>124</sup> M7 said ‘I just mention it as an option [the prosecution] have got, and do they want to do anything about it. Because I don’t want to sentence him there and then and find that he’s brought back later for the breach’. M6 similarly said:

I don’t agree with the position I believe applies in the Northern Territory and perhaps elsewhere – I don’t believe that a court should initiate action against an offender. The court is at risk of compromising its impartiality and appearance of impartiality...[but] I think a court has a responsibility to ensure that its orders are taken seriously, to have integrity and if we are to make orders that no one takes seriously, or are not prepared to advert to, then we run the risk of compromising the situation. So I reluctantly bring the prosecutor’s attention to the fact that there is an apparent breach of the suspended sentence and ask whether there are any instructions to take action in respect of it. I never say ‘I expect you to take this action’, either expressly or by implication. I simply draw it to the prosecutor’s attention and say ‘do you want an adjournment to take instructions on this?’ Sometimes they come back and say ‘we’ve taken instructions and don’t intend to breach’. Usually they say ‘oh, yes, and here’s the breach application, now it’s been brought to our attention’... It’s I suppose a matter of individual judgment as to where you strike that balance between being interventionist and biting your tongue as you see a possible miscarriage of justice taking place which might undermine the respect with which this the court’s orders are held.<sup>125</sup>

M5 had ‘no difficulty with the court being the trigger to enable’ a matter to be automatically placed before the court, although this would still mean there would be ‘a delay in time in order for that information to be gathered and the prosecutor to take charge to get on with it’. J2 considered that ‘the one improvement that I think is necessary is the introduction of a more effective system to deal with people who breach the conditions of a suspended sentence’. J3 was also keen to see ‘someone prodding the police’, adding:

The only thing that really irritates me is where someone has breached and nothing’s been done...One thing I really would like with suspended sentences is rigorous pursuit of them when they’re breached...I’d like to know that there was a person who was responsible for monitoring breaches and who was in turn responsible for ensuring that offenders were promptly served and the breach hearing brought on...It would be better if one person was monitoring the process.

To this end, J1 suggested designing computer software, ‘so that as soon as a particular offence turns up, it’s recognised as a breach or potential breach, at least to be looked at’,<sup>126</sup> and felt that

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<sup>124</sup> This was confirmed by Mollon, who mentioned two magistrates by name who ‘will adjourn for six weeks, [and say] prosecution are to list their application for this next court date. And that is fabulous for us because we...get it all ready and [the offender is] there to go and they’re sentenced on the new matter’: Meeting between Lorana Bartels and Senior Constable Jillinda Mollon, Police Prosecution Services, Hobart, 24 April 2007 (Meeting with Mollon).

<sup>125</sup> On this issue, Mollon regarded it as part the judicial officer’s function to point out any apparent breaches because ‘they’re the ones that give suspended sentence so it should be their job to say – you were given a chance, you didn’t take this’. She also noted that police prosecutors often miss instances of apparent breach because they deal with 100-150 matters a day and are often in court five day a week: Meeting with Mollon, *ibid.*

<sup>126</sup> Similar proposals have been made by the DPP, Police Prosecutions and TLRI: see [7.7].

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perhaps if more were dealt with for breach it might reinforce the nature of the sentence. That's an administrative matter, not something we can control. If breaches were almost automatically taken back before the courts, even if the DPP might take the view that the court's not going to put the person in for this breach...if they're brought back, it will reinforce the idea that you will be brought before the court and you are liable to be re-sentenced, so if it were there as a known quantity it might reinforce the nature of the sentence.

J1 also made the following observation in relation to the failure to take breach action:

I've heard comments that the terms of the suspension are too loose, such that a prosecuting authority can't actually be sure that another offence or something has breached it. When I imposed one...where it was a condition that for two years he not commit any offence involving trespass, damage to property or violence. Now I wouldn't have thought that was all that hard to interpret but I suspect that there might come a time when somebody perhaps has an argument about whether a particular offence comes within those categories. So we've probably got to be fairly careful about the terms of our suspension.

The timeliness of breach proceedings was raised by a few respondents, with M1 remarking that 'quick justice is good justice'.<sup>127</sup> J2 was concerned that someone may re-offend, be convicted and released from jail before a breach application is made and it would 'therefore be unfair to send them back to jail, whereas an extension of their sentence would have been appropriate had the application been made prior to the offender's release'.<sup>128</sup> Two respondents were keen to see breach applications heard concurrently with the sentence for the breaching offence.<sup>129</sup> As J6 noted:

They wait for the offender to be charged and to be sentenced, and then somebody in the DPP's office or in the probation office gets out an application form, fills it in and files it and then looks for the offender to serve the application. The offender may have moved address or disappeared – and eventually they finish up in court for the breach one or two years later. It is plainly wrong to me. It should all be part of the same process. In most cases I would much prefer to be dealing with them for the breach at the same time as I am sentencing them for the breaching offence...There should be

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<sup>127</sup> Mollon similarly observed 'what's the purpose of sending someone two years after they committed an offence? That's not justice': Meeting with Mollon, n 124. For further discussion, see [7.2] for discussion of the process for dealing with breaches in Launceston Court and [7.5.5.3] for analysis of the time it takes for breached matters to be resolved in the Supreme Court.

<sup>128</sup> Note also the submission to the TLRI by then Chief Justice Cox: 'In some cases breach proceedings are initiated long after the breach is proved by conviction. It goes against the grain to activate a sentence if the breach has already been punished and the prisoner released after a subsequent sentence. Some limitation period for the institution of such proceedings after discovery of the breach is worth examining': (Submission 3), Sentencing IP Responses, n 104.

The DPP commented on this issue as follows: 'I would be sure there have been cases that have come to me too late. Where it's been spotted too late that we should have taken breach proceedings but they've had a subsequent sentence and they would have finished that and it's clear that the judge is just going to reimpose [the suspended sentence], at worst': Meeting with DPP, n 97.

<sup>129</sup> In this vein, note the recent NSW decision of *DPP (NSW) v Cooke* (2007) 168 A Crim R 379, where it was suggested to be 'of crucial importance that the breach proceedings be resolved before the sentence is imposed for the [breaching] offence. This is because, as I have indicated, the result of the breach proceedings can affect the sentence to be imposed for the offence but the sentence for the offence is irrelevant to a determination of whether there are good reasons to excuse the breach': [28]. Note however that this approach may cause complications where the person denies guilt for the breaching offence.

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available a process whereby both the breaching offence and the breach come before the court at the same time.<sup>130</sup>

Another magistrate advocated

lodg[ing] your application when you say an offence has been committed so the offence and the suspended sentence application can be dealt with at much the same time.

**LB:** So you would like to see the application for a breach initiated at what point?

**M10:** In an ideal world, it could be lodged with the complaint laying the fresh offence.

**LB:** So before a conviction has been entered?

**M10:** Oh yes, definitely. And it just sits there as a parallel proceeding until such time as there's a conviction. That's the way I would deal with it.<sup>131</sup>

Overall, several magistrates criticised the lack of prosecution action in relation to breaches. M2 said there had been 'concern by some of the magistrates about breach procedures not being carried out...that the suspended sentence breaches are not policed with the enthusiasm that perhaps they should be'. M1 also reported having complained about the fact that

the Department don't breach them, the police don't breach them – so I get people who come up before me on resentencing and I notice that the offence is within the suspended sentence and I ask for them to breach them...I have noticed a couple of others that have come back and I've asked, are you going to breach them? And they don't breach them, so they've still got that over their heads after I've convicted them. And do I take it into account? As a prior? If I do, then I figure they're going to get something for that, so I'll discount it, but on the other hand, I'm sure the lawyers are saying that I've taken it into account the other way. So it should automatically come back.

M5 similarly stated that:

there should be no discretion that a person's breached and placed before the court. I think that should be absolutely automatic. The moment they're not breached, it undermines the efficacy of the order and it almost promotes further breaching. So I think they should be breached. They've got to understand that they've got to face court in relation to this and they're at risk of having to serve it.

Three magistrates referred to a recent change in prosecution practice, so that 'mercifully, now they are [breached] regularly, but as recently as 12 months ago [early 2006], they weren't' (M10). M5 spoke about this issue, as follows:

we had a period where breaches just didn't seem to happen at all, to the extent where it really appeared to be undermining the efficacy of the suspended sentence. And I was concerned that really we'd have to be getting to the point where we'd have to be considering whether the suspended sentence was appropriate...So I think there is a need for perhaps some sort of automatic breaching there. Having said that, that is now

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<sup>130</sup> The difficulties of serving the breach application were also commented on in my meeting with Mollon, who detailed the steps required to be taken to obtain the relevant documentation and 'then it's not served because we can't find him or her.' She estimated that in about 50% of cases the application couldn't be served because the offender could not be found: Meeting with Mollon, n 124. This issue obviously doesn't arise in respect of prisoners, whose applications are served on them in custody, or Launceston Magistrates' Court, where the process is said to be different. For discussion, see [7.2].

<sup>131</sup> Note however that the DPP commented that this approach could lead to magistrates complaining that material on the offender's prior convictions had been put before them: Meeting with DPP, n 97. This proposal has been considered by Police Prosecutions: see [7.2].

not the case and we've seen breaches being dealt with really promptly and coming before the court...We don't quite know why it's changed. I think it was police and Community Corrections people and I don't know why...We did raise our concerns at one point about the fact that we just weren't seeing them...But if you get away with it once, you know that will promote that person re-offending...It undermines the efficacy of our orders and secondly, I think can create injustice for the individual, and it's obviously leading to the view that this is a meaningless order...And if we're looking at lack of public confidence in the orders, they're entitled to have a lack of confidence if people really are able to ignore these orders and not be breached, I think it's a legitimate concern. And I'm very troubled by that. I think the orders are only as good as the enforcement behind it

M4 also remarked on this change as 'a huge improvement' and suggested it was because the new head of prosecutions, Julian Whayman, had 'determined that as a matter of course, if there's a breaching offence, a breach application should be lodged for that offence if there's a plea of guilty', adding:

it creates more work for us, but if it's my sentence, I meant that they would serve time in jail if they breached. I think it's really quite positive what's happening... otherwise there is no point in these sentences. And I even say, in the cases that are borderline whether they go in for part of it or are wholly suspended, I'll even say, 'could Prosecution note, I would expect an application to be lodged if this defendant does breach it'.

Whether or not there has been any significant and lasting improvement in this regard in either jurisdiction, the above comments highlight the ongoing need for better management of breaches. To this end, the TLRI has called for 'the procedures for follow-up and actioning breaches of community orders [to] be radically overhauled',<sup>132</sup> as well as calling for a review of breach procedures. It was noted:

It seems that efforts have been made by the Director of Public Prosecutions and Tasmania Police to ensure that proceedings for breach are initiated in all cases and in a timely manner. This is to be commended. However, there are a number of obstacles to achieving improvements in actioning breaches and a review should be undertaken to explore whether the administrative changes put in place have produced improvements.<sup>133</sup>

Although the comments in this section evince a lack of support for the proposal to give judicial officers the power to deal with breaches on their own motion, there was a strong sense of dissatisfaction with the current system. The TLRI has described my proposal as a 'thorny issue' and noted that the judicial officers I spoke to were 'unaware of the dire position in relation to breach proceedings'. Accordingly, in spite of judicial opposition, the TLRI proposes that courts be granted this power 'in the interests of efficiency and to help address the problem of breach proceedings',<sup>134</sup> an approach which is strongly supported by the Police Prosecution Service.<sup>135</sup> If

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<sup>132</sup> *ibid*, 75.

<sup>133</sup> *ibid*, 30.

<sup>134</sup> TLRI, n 34, 31. Note that it is suggested that the prosecution be required to verify the details of the suspended sentence so that the judicial officer's position is not compromised.

<sup>135</sup> Meeting with Mollon, n 124, where it was said 'that's the issue I have, that they're not dealt with at the time they are sentenced on the new matter...We just need the legislation changed. That would fix our problems...if we hand up prior convictions and the magistrate sees that by being convicted of this matter, they would be in breach of a suspended sentence, [the magistrate] should automatically have

adopted, this would have significant resource implications, given the estimate that currently half of all breach applications cannot be served on the offender.<sup>136</sup>

### 3.4.7 Partly suspended sentences

#### **How useful do you find partly suspended sentences? In what sort of cases are they especially appropriate/inappropriate? (Q19)**

Three out of six judges said they used partly suspended sentences quite frequently, while the other three did so only rarely.<sup>137</sup> J2 suggested using them ‘where the offending and/or the prior convictions are so serious that the offender has to go to jail but there are mitigating circumstances [and] where a partial suspension might really work in deterring the offender from re-offending on release’. J6 saw partial suspension as appropriate ‘with a serious crime, or relatively serious crime, for a first offender’ while J1 nominated cases with factors ‘suggest[ing] that an actual custodial term just can’t be avoided, but there are also factors which suggest that if they’re then let out of custody with the rest of it hanging over their head then there might be an opportunity to rehabilitate them’. J1 also suggested partial suspension to be particularly appropriate in cases of domestic violence where

there’s not much justification for not putting somebody in jail but if it’s somebody without a history of violence apart from in that context and you can set up the rehabilitation of a domestic violence program...that somebody can attend and you can maintain a level of protection for the complainant.

For those who said they did not use them much, one said that this was because ‘partly suspending it simply gives a lesser immediately effective sentence...in the main, I would prefer to give the lesser sentence’ (J3). Two judges suggested that parole was a better means of promoting an offender’s early release, with J4 suggesting that:

instead of me guessing what the offender will be like in, say, a year’s time or whatever the period of suspension is, experts – if that’s what you call the Parole Board – will know exactly how he is at that time. They will know whether in the prison he’s got into bad company and drugs and violence or whether he’s been a model prisoner and undergone some TAFE courses and been successful and so on and they’re much better informed to make the decision of whether he or she should be released than I am.

Partly suspended sentences are of course of different relevance in the Magistrates’ Court, because the vast majority of sentences imposed are of a shorter duration and therefore do not attract parole.<sup>138</sup> Several magistrates described partly suspended sentences as useful, with three suggesting this was especially so in the context of offenders who had not previously been to jail (M1; M2; M3). The risk with this approach, however, according to M6 is that

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the power to say ‘ok, you are sentenced on this matter. Therefore you are automatically in breach of your suspended sentence. Do you show cause? No? Off to jail you go...it means we’ve got the application in the court system. We haven’t had to go and use police resources to go and find the person’.

<sup>136</sup> See discussion at fn 130.

<sup>137</sup> Interestingly, there did not appear to be a correlation between self-reported use of partly suspended sentences and my findings in Chapter 4 as to judges’ actual use of partly suspended sentences.

<sup>138</sup> See [4.3.2] for data on the length of sentences imposed in the Supreme and Magistrates’ Courts.



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you can remove the fear of the unknown. I knew very few people that actually enjoy imprisonment, but by removing the fear of the unknown, some people could think, oh, it's not as bad as I thought it was. In an appropriate case, it is useful to give a person a taste of imprisonment, and then suspend it and say 'there'll be more of that if you do this again'.

M5 supported partly suspending lengthy cumulative sentences where 'what they've done in the case before us must receive a jail term but you look at it and think, well, they've spent so long in prison, are there prospects that they'll be motivated to be deterred from further offending' and said that partial suspension is

a very useful sentencing option...in those circumstances where jail is inevitable. The person has to serve a term but there are some prospects and you want to encourage those prospects and you want to find a vehicle for their rehabilitation and an incentive to cooperate with intervention from other agencies in that case.

Domestic violence was also mentioned by M4 as a 'classic' case, 'probably the most common and obvious category of offences where I would partly suspend. There's something that they can do when they come out to help them and that they're ordered to do'. Two magistrates mentioned drink-driving cases, because 'most people are capable of being put off with a short actual sentence, so you don't want to have them there for any longer than is actually necessary to achieve the objective' (M10) and one can thereby 'impose a deserved term of imprisonment, but not long enough so they lose their employment' (M6).

Partly suspended sentences were said to be inappropriate for offenders who had previously had partly or wholly suspended sentences (M3) or where it would be regarded as a 'soft option' (M5; M10), especially 'for a recidivist who goes committing crime and there really are no prospects for them and they're not going to be deterred by that fashion of suspended sentence' (M5). M7 suggested that a partly suspended sentence would be inappropriate in the same circumstances as a wholly suspended sentence, namely 'where there is no remorse, where there is little prospect of rehabilitation. Where the offence is grave, sufficiently grave that it really deserves imprisonment, and the offender himself merits it'.

Three magistrates said they used partly suspended sentences only occasionally, with one adding that 'if I'm going to suspend a sentence, I'll normally wholly suspend it' (M9). M4 felt that once

you've come to the conclusion that they've got to go to jail, I'd need to be very confident that there wouldn't be a breach of the part that's suspended. That they were well on their way to overcoming [their drug addiction]...I'd want that ray of hope because otherwise, again, you're really setting them up to fail.

Interestingly, M4 said it was easier to make the sentencing decision in relation to partly suspended sentences, than determining 'whether they should serve some time or not because 'you're sitting in court, and you know the person needs this much in, the whole sentence should be this, and it can be part suspended. It comes to you...these ones particularly do, the partly ones become clear'.

In *Hawkins v The Queen*,<sup>139</sup> Slicer J commented that ‘The suspension of portion of a sentence allows for certainty in the date of release and enables the Court to retain power for future transgressions and, to some extent, provide a future form of control’.<sup>140</sup> Evans J however suggested that ‘When paying regard to matters such as the reform prospects of the recipient of a long sentence, the preferable course is to fix a parole eligibility period’.<sup>141</sup>

**How do you see the interaction between non-parole periods and partly suspended sentences? Are there certain cases where you prefer one over the other? Why? (Q20)**<sup>142</sup>

Three judges preferred to give the Parole Board control over the date of an offender’s release. As J1 said:

If you’ve given somebody a fairly long sentence, you just don’t know how they’re going to react to it. You may have somebody who has a two year sentence who goes on to be a model prisoner, takes up all the rehabilitative type options that are available to them in prison, does everything right and should be released when their parole period is up. You’ve got somebody else who might be sentenced to exactly the same time, has exactly the same options, but just ignores the lot. Now we have no control over that, we have no way of reviewing that if it’s just a suspended sentence situation. But if it’s a parole situation, you’ve then got the Parole Board that can actually look at

<sup>139</sup> *Hawkins v The Queen* [2004] TASSC 55. Note that analysis of the Supreme Court data discussed in Chapter 4 demonstrates that 15% of partly suspended sentences also had a non-parole period set. Fox argues, however, that ‘to impose a sentence with a non-parole period and suspend a portion of it is undesirable, for it would defeat the purpose of either the non-parole period, or the period of parole supervision, or both, depending on how much of the sentence was suspended’: Richard Fox, *Victorian Criminal Procedure: State and Federal Law*, Monash Law Book Cooperative Ltd, Clayton (12th ed, 2005), [9.7.8]. For further discussion of the interaction between partial suspension and parole, see *R v Thorley* [1999] TASSC 73 and *Balmer v Tasmania* [2006] TASSC 97, [16] (Evans J). Note the comments in *Rodney Allen* (COPS, Evans J, 4 December 2002); *Michael Edgerton* (COPS, Crawford J, 5 December 2002) and *Matthew Bresnehan* (COPS, Slicer J, 28 June 2004) and see also SAC Interim Report, n 103, [4.12]-[4.14].

<sup>140</sup> For similar statements, see *R v Cassar; ex parte A-G (Qld)* [2002] 1 Qd R 386, [14]; *R v Seabrook* [2004] QCA 210 and *Lapic v The Queen* [2005] ACTCA 40, [5]. See also *R v Boland* [2007] VSCA 242, [13]-[14].

<sup>141</sup> Evans J had earlier taken a similar approach in *Devine v The Queen* [2003] TASSC 52, [24]. It is interesting to note that Evans J was Deputy Chair of the Parole Board before being appointed as a judge. His confidence in the advantages of the Parole Board may therefore stem from valuable personal experience.

<sup>142</sup> The court has a discretion whether to order parole: *Sentencing Act 1997* (Tas), s 17(2)(a)-(b); where it does so, it must not be less than half of the period of the sentence: s 17(3). See also s 68(1) of the *Corrections Act 1997* (Tas), which provides that the non-parole period in respect of a sentence of imprisonment is a period equal to one-half of the period of the operative sentence. A prisoner is also not to be released on parole before the completion of the non-parole period or a continuous period of imprisonment of six months, whichever is the greater, unless there are exceptional circumstances warranting earlier release on parole: *Corrections Act 1997* (Tas), s 70. Tasmania is unusual in providing that the terms and conditions of parole are left entirely to the Parole Board (s 72(5)). In the other jurisdictions, general conditions are set out in the legislation. In addition, in other jurisdictions, the legislation generally provides in respect of determinate sentences that parole runs from the date of release until the expiry of the offender’s sentence, whereas in Tasmania, the Parole Board sets the appropriate length of the parole period: see s 72(3)(a)(i). Note *Crimes Act 1914* (Cth), s 16, which provides that the maximum period of parole is five years, with the effect that parole may expire before the end of the offender’s head sentence. This is proposed to be amended, with the effect that parole ends at the expiration of the offender’s sentence: see ALRC, n 80, Rec 23-9(a). For further discussion of parole in Tasmania, see Warner, n 70, [9.6], Edney and Bagaric, n 44, [12.4.2.7] and Laws of Australia, *Criminal Sentencing*, Volume 12, Law Book Company, Sydney, [12.8.500]-[12.8.550], current as at 13 September 2007.

### 3. Interviews with judicial officers

what the person's done and review it and they might say that person's had a non-parole period of 12 months and they've done everything right, they get their parole. The other one hasn't, no they're not getting their parole. I think parole is a more appropriate method of control than a suspended sentence in a lot of situations, particularly where somebody is serving a reasonably lengthy term.

J2 suggested that since parole has little significance with shorter sentences, my question really related only to sentences of one year or more, and in that context,

I don't really see much role for a partially suspended sentence. I think that if someone's going to jail for that sort of length of time, it's generally much more appropriate for them to be released on parole and under the supervision of a parole officer and to have the parole period hanging over their head, rather than to suspend some of the head sentence.

The other three judges said there wasn't much difference between the two positions, with J4 stating that 'probably both views are right', while J5 suggested that 'there's probably not much difference', adding 'once we start going over about two years, I don't believe suspended sentences have much work to do. It would be stupid for me to give you seven [years] and suspend four...I don't know what you're going to be like'.

The issue was somewhat different in the Magistrates' Court because, as M7 noted, 'it is unusual to sentence a person to a term of imprisonment which could activate the parole arrangements...it's not a matter to which I've adverted in my daily practice'. Five respondents preferred the Justice Evans model, two preferred the Justice Slicer model, and two saw merits in both positions. M4 preferred the Justice Evans model because

I trust the parole process and the degree of control over prisoners when they come out. It just appears to me to be a better degree of control than even a probation order under a suspended sentence. If they're on parole, they're tighter...There'd be the occasional one where it's a suspended sentence but it's more non-parole.

M9 referred to Justice Slicer's comments about enabling the Court to retain power for future transgressions, and said, 'I don't look at it like that. Once I sentence somebody, they're out, they're gone. I don't like to think that I have some proprietorial interest in them'. M8 also felt that the judicial officer should not be exercising control over the sentence and that 'it's better off to leave it to the Parole Board for an informed body to be making those decisions one way or the other'. M2 considered that there 'are actually arguments both ways' but would ultimately prefer Justice Evans' approach because 'from a pragmatic point of view, it's neater'. M7 didn't have a 'principled reason for one over the other', but suggested that the suspended sentence 'allows for an offender to misbehave and be released on that day, [so] for prison control reasons, it's probably better to fix a non-parole period'. Overall, however,

Slicer [J] and Evans [J] are drawing a distinction where there's not really one in some ways. I mean, every person in jail knows when they might be entitled to parole. Every single one, down to the last day. They know it. And they know that if they behave, and all goes well for them, they will be out on parole on that day, or shortly after. The same with suspended sentences...every prisoner knows with certainty – you ask them...they know the ins and outs of it fully.

For M3, ‘both are applicable because it may be that because of the nature of the offence you want to make sure that they’ve got a head sentence and something to serve for that offence if they don’t do the right thing, plus to make a certainty of the parole period’, but on the other hand, a partly suspended sentence can ‘be around for longer’, whereas the parole period ‘only goes for the time they’re actually serving the sentence’. M5 also thought ‘there are absolutely merits in both positions’ and went on to state:

Sometimes there are reasons to see somebody released from prison, other than their good behaviour in prison, and you’re really looking at factors such as drug and alcohol counselling, that sort of thing. They may have some prospects but it’s really conditional on their ability to address these issues which have put them in this situation in the first place...So what you’re really wanting to achieve is this intervention from other agencies. Now parole gives you that too, but it’s not as specific and it doesn’t give the court that control. So I might have really identified that a person needs heavy intervention from drug and alcohol counselling, really intensive support, participation in the Bridge program, so I might want to set up a raft of conditions that if they breach they’re back in, because they’re only going to rehabilitate if they resolve these major drug issues they’ve got. On the other hand, with long sentences, a lot can happen while you’re in prison. It can be quite irrelevant with long sentences, or housing may be a consideration...I think really, for the court to try and control it from such a long distance perspective is really tricky and probably leaving it to the parole officer, who can probably tailor support or direction...[but] I think partially suspended sentences versus parole can be really useful where you want to suspend the majority of the sentence – you can’t really compare it with parole then, because you’re reserving a much greater portion, but what you want to provide is this really strong incentive to cooperate. So you might want to give 12 months, nine suspended. Because you want that person to have felt the impact from prison, come away from prison with nine months hanging over their head for future deterrent. So I think partially suspended sentences have that role in that sort of case.

On the other hand, M1 agreed with Justice Slicer that because the Parole Board deals with so many cases, ‘you just can’t consider them to the same extent’, unlike a judicial officer sitting in their office, ‘they’ve got more pressure on and they’ve got to make a committee decision instead of just one’. With suspension, by contrast, ‘everybody knows where they stand’. M10 also preferred the suspended sentence approach ‘because I don’t have much faith in the Parole Board’s decisions’ adding that looking at prior conviction sheets demonstrates ‘sometimes how ridiculously soon people have been released on parole, even though they may have numerous previous parole breaches’.

#### 3.4.8 Federal offenders

**What comments, if any, do you have regarding the provisions for recognizance release orders for federal offenders in Part IB *Crimes Act 1914* (Cth)? (Q21)<sup>143</sup>**

There was very little enthusiasm for the current provisions for recognizance release orders in the Commonwealth *Crimes Act 1914*, with many describing them as ‘complex’ (J1; J2; J5; M6), ‘complicated’ (J4; M5) or ‘difficult’ (J3; M9). M8 said ‘I think they’re weird. They’re very old worldly’ and M10 suggested the ‘workability

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<sup>143</sup> See [2.2.2.3] for an explanation of the provisions for recognizance release orders.

of it is like wading through treacle’, but was also the only one to commend the provision overall, suggesting that ‘it’s hard to comment adversely on the principle of it all, which works well from my point of view’.

The ALRC recently recommended that the term recognizance release order be replaced with suspended sentence.<sup>144</sup> Several respondents regarded the term ‘recognizance release order’ as incomprehensible to defendants, with M3 suggesting it ‘may leave people with a bit of a blank look’, while M9 felt ‘your average punter in the street wouldn’t have a clue what that meant... people understand what a suspended sentence is more than a recognizance release order’.

It appeared that sentencers also felt unsure about how to proceed under the legislation, with a need to ‘study it at length’ each time (J2), although it was conceded that ‘I suppose if I regularly sentenced under it, it would be a lot easier’ (J6). J5 said ‘I usually get the Commonwealth lawyer, if they can get their act together, to actually explain it to me each time... I’ve got no idea what it means and every time I deal with one I’ve got to work really hard’. J4 described them as:

so complicated, I hate them! I dread it when I get a Commonwealth offender. I always say to [my associate] ‘oh, can you help me with the *Crimes Act* sentencing provisions’ and he says ‘they haven’t changed lately, your Honour’ and I’ve got to look it up myself. Why do they have to be complex?

Two respondents referred to the fact that, unlike a suspended sentence, a recognizance release order nullifies the effect of remissions<sup>145</sup> and thereby sets a specific date of release, but they were at odds over whether this was a good thing. J3 commented that ‘a person can behave absolutely appallingly in prison and still get their recognizance release’, whereas they would not get remission of the suspended sentence. In the view of M6, who uses them frequently, however, the order is

a particularly useful device because one is regulating, as I understand it, the precise time of release, so you’re not handing over the discretion to an officer of the executive government with good behaviour remissions and so on. You serve four months imprisonment upon entry into recognizance etc. You know what’s going to happen.

M5 referred to the ambiguity in the Commonwealth legislation as to the interaction between suspended sentences and community service and therefore sought

a clear statement that a community service order as a condition of a suspended sentence is a legitimate sentence.... I think community service as a condition of suspended sentence would be a useful sentencing tool. And also perhaps a clear statement that community service and suspended sentences in combination are a legitimate option. A lot of magistrates do that, but I think it would be useful to have a statement that that’s an appropriate sentencing outcome.

The issue of paying a recognizance was the subject of criticism, because ‘half the time the offender can’t pay it’ (M8). J1 added:

<sup>144</sup> ALRC, n 80, Rec 2-3. See [2.2.2.3] for discussion.

<sup>145</sup> Note *Frost v The Queen* (2003) 11 Tas R 460, where the Court of Criminal Appeal held that that the Tasmanian regulation allowing for remissions applied to sentences of imprisonment imposed on federal offenders and that no part of the regulation was caught by the exclusion in s 19AA(1) of the *Crimes Act 1914* (Cth). For discussion of remissions generally, see Laws of Australia, n 142, [12.8.1240]-[12.8.1340].

You've only got to look at the fines enforcement unit and the amount of money that's outstanding by way of fines. I think it's an unnecessarily complex system and I'm not sure it achieves anything more than a suspended sentence would achieve because you've got a lot of offenders who don't have any money or assets anyway, so what's the use?

There was also criticism of the lack of flexibility on breach (J2), although the need for a standardised national system was acknowledged (J2; J4; M6). M6 noted that 'there could be an attempt thereby to bring about some kind of conformity in sentencing across the country. I suspect however that if that's the policy, it's failed dismally'.

#### 3.4.9 Reform

##### **Finally, what legislative, administrative or judicial changes would you like to see in relation to the use of suspended sentences? (Q22)**

I asked this question in order to give respondents the opportunity to canvass any issues not expressly covered in the interview. Overall, sentencers were keen to retain the status quo in relation to suspended sentences, saying the situation is 'good at the present time,' (M3) and that they were 'happy with the way it works' (M10).<sup>146</sup> Some expressly referred to the undesirability of abolishing suspended sentences (J1; J3; M3). There was also support for retaining a broad discretion overall, with M8 saying 'I have about as much discretion as I feel I deserve' and J1 saying:

I can't really see anything that can be changed if you're going to retain suspended sentences, and I certainly feel that you should. There's nothing that I would change in the system in the way that it operates at the moment, which basically allows judges and magistrates a fair bit of flexibility in the circumstances in which they impose them.

As discussed in Chapter 2, there is no legislative restriction on the length of operational period which can be imposed in Tasmania.<sup>147</sup> Nevertheless, J6 was of the view that judicial officers were constrained in this regard, stating that:

I sometimes think of suspending a sentence for four or five years but realise that other judges do not do that and so I resist doing so...I think that there is a tendency to make them too short. And I do not think they are particularly effective if they are. A serious crime and you suspend it for only 12 months, so all they have to do is avoid being caught for 12 months...I think they should be longer than that. I will sometimes suspend for longer than the probation period or supervision period. Under the previous regime there was a three year [limit] on suspensions operating and I do not think there has been much change in sentencing practices since the change in the law.

Several magistrates were keen to see greater guidance from the Supreme Court about various aspects of the proper use of suspended sentences. M1 felt it would be helpful to have a guideline about what suspended sentences are to read out in court, while

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<sup>146</sup> The high level of satisfaction with the existing system conforms with Tonry and Rex's assertion that 'Judges tend to be less dissatisfied with sentencing than other people': Michael Tonry and Sue Rex, 'Reconsidering Sentencing and Punishment in England and Wales' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002) 1, 10.

<sup>147</sup> See [2.2.3]. Data on the length of operational periods imposed in the Supreme and Magistrates' Courts are presented in [4.3.3].

M7 wanted something in the nature of a guideline judgment in relation to suspended sentences, suggesting ‘the judges get together, as they have in some other jurisdictions, in NSW in particular, and say, as a combined court...“this is the best approach to adopt”’, adding that ‘we get differing messages from each judge’. M4 would welcome set guidelines in relation to the discretion on breach and the factors to be considered and M6 suggested that there may be value in creating ‘a document that goes with the Memorandum of Suspended Sentence that spells out what can happen...in the clearest of terms’.

Several respondents spoke of the need for better resourcing and monitoring of programs, especially for offenders with mental health and substance abuse issues. Two judges felt ‘it all comes down to money’, with M2 regarding the lack of programs for drug offenders, especially in prison, as ‘appalling’.<sup>148</sup> M5 was concerned that anger management counselling had recently been restricted only to cases involving family violence. M2 also spoke of the need for more community based programs generally and advocated the need for greater support for people on suspended sentences

to deal with the problems in their lives which are linked to the offending – their substance abuse, their relationship problems, some of their mental health issues...I’ve seen some magistrates put people in prison for driving without a licence but with some people, the reason they don’t have a licence is that they can’t read or write to get the licence in the first place...We can’t presume that these people have the skills that we assume they have.

Three respondents also wanted to see more thorough monitoring of orders.<sup>149</sup> M6 suggested that ‘the making of a probation order that is...onerously applied is an effective way of keeping the suspended sentence before the person’s eyes’. M4 was keen to see suspended sentences linked in ‘with probation and obligations to attend to counselling, whether it was drug and alcohol counselling, psychiatric assessment and all of that’ arguing however that in order for suspended sentences which depend on compliance with the probation order to work, ‘there needs to be a whole managed system of the probation order being monitored’. J1 proposed:

providing structured programs in which there’s almost a reporting system that you suspend a sentence on condition that somebody attends a particular program and there’s a mechanism for reporting back, either to the court or the prosecuting authority, where there’s failure to comply, rather than a very loose arrangement where somebody says they’re going to go to the Bridge program, or I’m going to get counselling from Anglicare for my gambling problem. So if there were extra structure there with a report back system, I’d be more inclined to use it.

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<sup>148</sup> This echoes the finding that four out of five surveyed Canadian judges stated that they would be more inclined to impose conditional terms of imprisonment if they could be assured that more resources were available: Roberts, Doob and Marinos, n 13, Table 2.10. Note the recent report by the Attorney General, The Hon Steven Kons MLA, that drug and alcohol programs at Risdon Prison have been expanded: TLRI, n 34, 14. On this issue, the TLRI has made a draft recommendation that resources should continue to be directed to evidence-based rehabilitative programs for prisoners including for drug treatment, with participants to be followed up after release with appropriate social support and after-care to ensure that any program gains are not lost: 15.

<sup>149</sup> See discussion in [5.3.1.5] in the context of offenders with substance abuse issues.

It is also worth noting that although not asked about it, several respondents commended the current position that breach proceedings are usually brought back before the original judicial officer who imposed the sentence. The DPP considered this practice a consequence of the ‘luxury of a small pool of criminals and judges’,<sup>150</sup> while the SAC recently recommended that ‘wherever possible, breach proceedings should be listed before the same judge or magistrate who imposed the original sentence (reflecting the current practice in the higher courts)’.<sup>151</sup> Senior Constable Mollon, by contrast, disagreed with this practice, saying as there was no need for it. In her view, ‘if the original offence was worth three months, then you go to jail for three months’, since ‘they’re all equals over there, you know, they’re all experienced magistrates’.<sup>152</sup> Nevertheless, if the TLRI proposal to give judicial officers the power to act on breaches of their own motion were accepted, there would still be scope for adjourning the matter for a few weeks to bring it before the original magistrate.<sup>153</sup>

Finally, although it was recognised that this was not really my ‘remit’, there was a general desire to see more alternative sentencing options. M2 suggested that suspended sentences were ‘probably given not as soft options, but occasionally when there is no other effective penalty’. Two judges were keen to see periodic detention (J2; J6),<sup>154</sup> while J1 and M9 criticised the restrictions on imposing penalties without conviction, suggesting they would like to have the ability to impose a fine or community service in the absence of a conviction.<sup>155</sup>

## 3.5 Conclusion

This Chapter presents the findings of my interviews with 16 out of 18 members of the Tasmanian judiciary, and as such, provides a unique insight into judicial reasoning and an invaluable source of information on judicial views on a range of issues pertaining to the use of suspended sentences.

The responses reveal an overwhelming support for retaining suspended sentences, even though they were generally seen as being inappropriate for ‘serious’ offences. Rehabilitation and personal deterrence were seen as the key objectives of suspended sentences, whereas denunciation and general deterrence were not regarded as being effectively met by a suspended sentence, although some said this was the purpose of such sentences in later questions. My questions about the kinds of cases where a

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<sup>150</sup> Meeting with DPP, n 97.

<sup>151</sup> Sentencing Advisory Council (Vic), *Suspended Sentences: Final Report - Part 1*, Melbourne (2006), Rec 12. See also *Crime, Courts & Confidence*, n 68, 57, where this was advocated as ‘best practice’ for the United Kingdom.

<sup>152</sup> Meeting with Mollon, n 124. It was submitted that this practice already operates in Launceston Magistrates’ Court, where ‘they don’t worry about [Magistrate A having] sentenced them so I, [Magistrate B], won’t sentence them. [Magistrate A] said you deserve three months for that, I’m not going to argue’.

<sup>153</sup> *ibid.* It was suggested that the offender would be remanded in custody during this adjournment, which could have a significant effect on the size of the remand population.

<sup>154</sup> Note that the TLRI has recently opposed the introduction of periodic detention in Tasmania: TLRI, n 34, 44.

<sup>155</sup> The TLRI has now proposed to empower courts to do this: *ibid.*, 68.



suspended sentence would be appropriate or inappropriate, especially with respect to offenders with substance abuse, mental health or gambling problems, yielded a broad range of views. I also examine sentencers' views on combination orders, which were generally supported by both judges and magistrates, although there was concern about the utility of attaching a fine.

Respondents were asked to explain their reasoning process in deciding to impose a suspended sentence, in order to determine the convergence or otherwise between sentencing theory and practice. It quickly became clear that the *Dinsdale* two-step process is poorly understood and applied, a finding which has led the TLRI to suggest legislative amendment to clarify the process for imposing a suspended sentence.

Another key theme considered in the interviews is the need for effective communication about suspended sentences. Magistrates were more likely than judges to regard it as part of their judicial function to set out the factors leading them to the suspend the sentence and explain the significance of a suspended sentence to the offender. In my view, in light of the fact that suspended sentences are commonly poorly regarded and understood, it may be appropriate for both courts to review this issue, in order to determine whether there are ways of enhancing the flow of communication with offenders and the public generally, without undermining judicial discretion and independence.

Judicial views on public opinion and the media were also considered, with the majority of respondents indicating that suspended sentences are poorly regarded by the public. There was again a division of opinion between the courts as to whether public opinion influenced their decision-making, with judges more likely to see it as part of their function to reflect public opinion. Although most respondents suggested that there was nothing the court could do to improve suspended sentences' media image, there was a general call for more accurate media reporting, and to this end, some advocated the appointment of a media liaison officer.

One of the key themes to emerge from these interviews is that there is currently very little knowledge about the process for monitoring and dealing with breached sentences, with most respondents keen to see more information of this nature. This finding suggests a need for the relevant authorities, namely, the Director of Public Prosecutions, police prosecutions, Community Corrections and the Department of Justice, to liaise to determine an appropriate means of gathering, maintaining and disseminating data on breaches. My findings also highlight a strong desire for greater initiation of breach action, with respondents frustrated by prosecutorial inaction. Furthermore, the comments revealed some confusion as to the state of the law in respect of the discretion on breaches, a finding which has contributed to the TLRI's draft recommendation that there be a statutory presumption in favour of activation on breach.

There was moderate support for the use of partly suspended sentences and general dissatisfaction with the Commonwealth provisions for recognizance release orders, which were regarded as complex. When asked about any desired legislative, administrative or judicial changes in relation to suspended sentences, respondents

indicated a generally high level of satisfaction with the present system. There was support, however, for greater judicial guidance for magistrates, better resourcing and more thorough monitoring and management of orders.

Tata has suggested that judges – and one might infer, magistrates – ‘tend to be suspicious of anyone (especially academic researchers), asking questions and exposing the limitations of their practice’, suggesting this may be due in part to ‘a defensiveness about the implications of such enquiry. Judiciaries throughout the western world tend to be highly suspicious of empirical scholarly enquiry, especially in sentencing’.<sup>156</sup> More cynically, Walker has argued that the ‘interrogation of the sentencers themselves, even if they are willing to be interrogated, is not likely to be profitable’.<sup>157</sup> According to Ashworth, however,

Sentencing is a vital realm of public policy, and it should not be shrouded in secrecy simply because of fears about the possible reactions to research findings of the press and of politicians...The details of sentencing practice are a matter of deep social concern, and they cannot ever be discussed properly until they are made known.<sup>158</sup>

In my experience, the Tasmanian judicial officers were not only enthusiastic about being ‘interrogated’, but gave candid and insightful comments about their use of suspended sentences. This discussion in this Chapter constitutes a significant contribution to lifting the veil on sentencing generally and suspended sentences in particular.

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<sup>156</sup> Cyrus Tata, ‘Accountability for the Sentencing Decision Process’ in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002) 399, 411. See also Justice Michael Kirby, ‘Judging: Reflections on the Moment of Decision’ (1999) 18 *Australian Bar Review* 4 and Jacqueline Tombs and Elizabeth Jagger, ‘Denying Responsibility: Sentencers’ Accounts of their Decisions to Imprison’ (2006) 46 *British Journal of Criminology* 803.

<sup>157</sup> Nigel Walker, *Crime and Punishment in Britain: An Analysis of the Penal System in Theory, Law and Practice*, Edinburgh University Press, Edinburgh (1973), 213.

<sup>158</sup> Ashworth, n 9, 331.

## 4. QUANTITATIVE ANALYSIS

*There is some empirical basis supporting the hope that providing accurate information [on sentencing] can in fact improve public knowledge of crime and sentencing, and boost public confidence in the criminal justice system.<sup>1</sup>*

### 4.1 Introduction

As discussed in Chapters 1 and 3, suspended sentences are poorly regarded by the public and the media, coupled with a poor understanding of the use of suspended sentences and sentencing generally,<sup>2</sup> while international research indicates that increasing information levels may contribute towards greater public acceptance of sentencing options and the criminal justice system as a whole.

There is currently little statistical information available on the use of suspended sentences in Tasmania. Accordingly, this Chapter aims to fill the knowledge gap on how suspended sentences are used by presenting quantitative sentencing data for the Supreme and Magistrates' Courts. In particular, data are presented on:

- how often suspended sentences are imposed;
- the use of combination orders;
- the conditions on which suspended sentences are most commonly imposed;
- the length of sentences and operational period; and
- consideration of whether the data provide any evidence of net-widening or sentence inflation.

Sentencing dispositions are also analysed by key variables, including age, gender, prior record, offence type and seriousness and judicial officer imposing the sentence to determine patterns in the use of suspended sentences and other sentencing options.<sup>3</sup>

### 4.2 Methodology

This section presents a brief overview of the methodology for obtaining, coding and analysing the available data. Data analyses were conducted using the SPSS statistical package (Version 13.0) with  $p < 0.05$  as the test for statistical significance. Data were analysed using univariate, bivariate and multivariate analyses. The data for the Supreme Court covers all sentences imposed in a two year period ( $n=838$ ), while the data for the Magistrates' Court covers a one-year period ( $n=10,725$ ).<sup>4</sup> The

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<sup>1</sup> Kate Warner, 'Sentencing Review 2006-2007' (2007) 31 *Criminal Law Journal* 359, 360.

<sup>2</sup> See discussion in [1.5.2] and [3.4.5].

<sup>3</sup> One variable about which I did not have the relevant information, but which NSW research has shown to be strongly correlated with suspension, is bail status at the time of sentence: see Patrizia Poletti and Sumitra Vignaendra, *Trends in the Use of Section 12 Suspended Sentences*, Sentencing Trends and Issues, No 34, Judicial Commission of New South Wales, Sydney (2005), 20-21 and discussion in NSW Sentencing Council, *Seeking a Guideline Judgment on Suspended Sentences: Interim Report*, Sydney (2005), 16. Future research should therefore examine whether bail status is also a relevant consideration in Tasmanian sentencers' decision to suspend.

<sup>4</sup> These time periods were chosen in order to give a meaningful sample size, but not so large a sample that each case could not be analysed in detail. In addition, the time frame selected for the Supreme

methodology for the two cohorts is presented separately because the data was obtained in a different way.

##### 4.2.1 Supreme Court

The data for the Supreme Court were obtained by examining the COPS, also referred to in some jurisdictions as Remarks on Sentence, for all cases dealt with in the Supreme Court of Tasmania between 1 July 2002 and 30 June 2004 (hereafter ‘2002-2004’). The COPS, are delivered by the sentencing judge in open court when passing sentence and generally state the offence(s) for which the offender has been convicted, the objective circumstances of the offence and the subjective circumstances of the offender. An electronic database of these comments, TasinLaw, is available by subscription and is utilised by many legal practitioners.<sup>5</sup> I was also provided with a brief summary of each case prepared by the Supreme Court, analysis of which revealed that there were 45 cases where the COPS were missing from the TasinLaw database, the COPS for which were subsequently provided by the Supreme Court.

The information obtained from the COPS was entered into an excel spreadsheet and later transferred to SPSS for analysis. Because this discussion analyses sentencing decisions at first instance, where an offender was later re-sentenced pursuant to a successful Crown or defence appeal, the first instance sentence was used for statistical analysis.<sup>6</sup>

There were 862 cases in 2002-2004 where a sentence was recorded in TasinLaw, but the analysis is limited to the 838 cases where an offender was sentenced at first instance for an offence, other than a breach offence, life redetermination or pursuant

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Court data allows for a reasonable follow-up period for the reconviction and breach analyses undertaken in Chapters 6 and 7 respectively.

<sup>5</sup> Access to the TasinLaw database was kindly provided to me by the late Dr Val Haynes of the University of Tasmania.

<sup>6</sup> There were nine Crown appeals against sentence. The following five appeals were successful: *A-G (Tas) v C* [2003] TASSC 8 (sentence increased); *A-G (Tas) v Gee* [2003] TASSC 40 (sentence increased and partly suspended sentence imposed); *A-G (Tas) v Knight* [2003] TASSC 77 (unsuspended sentence substituted for wholly suspended sentence); *A-G (Tas) v Wells and West* [2003] TASSC 78 (sentence increased) and *DPP (Tas) v Watson* (2004) 41 MVR 153 (sentence increased).

The following were unsuccessful Crown appeals: *A-G (Tas) v McDonald* (2002) 11 Tas R 221; *A-G (Tas) v O* [2004] TASSC 53; *DPP (Tas) v NLW and JGW* [2004] TASSC 93 and *DPP (Tas) v Humphrey* [2004] TASSC 99.

There were also 19 defence appeals against conviction and/or sentence. Of these, five were successful, as follows: *Jordan v The Queen* [2002] TASSC 121 (sentence and NPP reduced); *Waddington v The Queen* [2003] TASSC 21 (NPP reduced); *Devine v The Queen* [2003] TASSC 52 (NPP reduced); *Prehn v The Queen* [2003] TASSC 55 (suspended portion of partly suspended sentence increased) and *Smith v The Queen* [2003] TASSC 76 (sentence and NPP reduced).

The following defence appeals were unsuccessful: *Shipton v The Queen* (2003) 39 MVR 143; *Devine v The Queen* [2003] TASSC 51; *Owen v The Queen* [2003] TASSC 53; *Smith v The Queen* [2003] TASSC 56; *Smith v The Queen* [2003] TASSC 91; *Crowley v The Queen* [2003] TASSC 147; *Clifford v The Queen* (2004) 12 Tas R 415; *Randall and Farmer v The Queen* (2004) 146 A Crim R 197; *Hawkins v The Queen* [2004] TASSC 55; *Philpott v The Queen* [2004] TASSC 56; *Saunders v The Queen* (2004) 149 A Crim R 174; *Langridge v The Queen* (2004) 12 Tas R 470 and *Pauly and Silva v The Queen* [2004] TASSC 140.

to a dangerous offender application.<sup>7</sup> The flowchart below sets out the excluded cases.<sup>8</sup>

Fig 4.1: Cases excluded from the Supreme Court 2002-2004 dataset

2002-2004 (n=862)

- Breach of suspended sentence (n=15)
- Breach of community service (n=5)
- Breach of probation (n=1)
- Life redetermination (n=2)
- Dangerous criminal declaration (n=1)

#### 4.2.1.1 Data coding issues

There were a number of instances where a decision had to be made as to how to code certain variables. This section explains the key instances where such determinations were made.

##### **Offence classification**

When creating the Supreme Court database, the terminology for offences employed by the judicial officer and the offence type groups in the TasinLaw database were employed, whereas the data later provided to me for the Magistrates' Court classified all offences by the Australian Standard of Classification (ASOC) code. All offences imposed in the Supreme Court in 2002-2004 were therefore subsequently recoded with the appropriate ASOC code as set out in Appendix H.

In reconciling the two classification systems, however, I found a number of inconsistencies of approach. Robbery, for example, is grouped together with burglary under the Tasmanian classification (Burglary/stealing/like offences) but is a separate category under ASOC (06: Robbery, extortion and related offences), while the Tasmanian 'miscellaneous' group contains several offences which are not classified in the equivalent ASOC group, and vice versa. Furthermore, the ASOC codes do not distinguish between burglary and aggravated burglary (which are both classed as 0711: Unlawful entry with intent/burglary, break and enter) or between armed robbery, aggravated robbery and aggravated armed robbery (0611: Aggravated robbery), although this is distinguished from the simple offences of robbery (0612: Non-aggravated robbery).

At the time of sentence, the judges would obviously have had regard to the local terminology. The data presented in Warner's influential *Sentencing in Tasmania* are also collated and presented on this basis. On the other hand, the Magistrates' Court data are presented on the basis of ASOC codes, which were after all, developed to promote national consistency. The following hybrid approach to classification was

<sup>7</sup> In this Chapter, each time an offender is sentenced is counted separately, in contrast with the analysis in Chapters 6 and 7, where each offender is counted only once. There were two offenders sentenced three times in the reference period (6 sentences) and 41 offenders who were sentenced twice (82 separate sentences). The remaining 750 offenders were sentenced only once in the reference period, giving a total of 793 individual offenders dealt with by the Court.

<sup>8</sup> See [7.6.2] for discussion of the 15 breach of suspended sentence cases.

adopted in the discussion of Supreme Court offences: in this Chapter, when presenting data on the use of suspended sentences by offence type, the ASOC classification for both the Supreme and Magistrates' Court data is employed, but in Chapter 5, where case studies are presented, the discussion adopts the terminology used by the judicial officer when imposing the sentence.

### **Offence type**

Because of the small numbers of some offence types within ASOC divisions, certain types of offences were grouped together in order to give data groups of sufficient size to be meaningful, as set out in Table 4-1.

*Table 4-1: Offence types by ASOC code and offence group*

<b>ASOC division</b>	<b>Offence type</b>
01: Homicide and related offences (n=16)	Violence (n=190)
02: Acts intended to cause injury (n=170)	Violence (n=190)
03: Sexual assault and related offences (n=92)	Sexual assault (n=92)
04: Dangerous or negligent acts endangering persons (n=4)	Violence (n=190)
05: Abduction and related offences (n=0)	Violence (n=190)
06: Robbery, extortion and related offences (n=77)	Robbery (n=77)
07: Unlawful entry/burglary (n=169)	Property (n=281)
08: Theft and related offences (n=78)	Property (n=281)
09: Deception and related offences (n=34)	Property (n=281)
10: Illicit drug offences (n=58)	Drugs (n=58)
11: Weapons and explosives offences (n=2)	Other (n=140)
12: Property damage and environmental offences (n=64)	Other (n=140)
13: Public order offences (n=18)	Other (n=140)
14: Road traffic and motor vehicle regulatory offences	Other (n=140)
15: Offences against justice/government (n=46)	Other (n=140)
16: Miscellaneous offences (n=10)	Other (n=140)

### **Offence seriousness**

There is an extensive body of literature on ranking the seriousness of offences.<sup>9</sup> For the purposes of simplicity and consistency, the National Offence Index (NOI), which was developed by the Australian Bureau of Statistics and ranks offences by

<sup>9</sup> See George Gescheider, Edgar Catlin and Anne Fontana, 'Psychophysical Measurement of the Judged Seriousness of Crimes and Severity of Punishments' (1982) 19 *Bulletin of the Psychonomic Society* 275; Mark Warr, 'What is the Perceived Seriousness of Crimes?' (1989) 20 *Criminology* 185; Richard Fox and Arie Freiberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23 *Australian and New Zealand Journal of Criminology* 165; David Indermaur, *Perceptions of Crime Seriousness and Sentencing*, Criminology Research Council, Canberra (1990); David Parton, Mark Hansel and John Stratton, 'Measuring Crime Seriousness' (1991) 31 *British Journal of Criminology* 72; Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1; James Carlson and Tricia Williams, 'Perspectives on the Seriousness of Crimes' (1993) 22 *Social Science Research* 190; Deirdre Golash and James Lynch, 'Public Opinion, Crime Seriousness and Sentencing Policy' (1995) 22 *American Journal of Criminal Law* 703; Michael O'Connell and Anthony Whelan, 'Taking Wrongs Seriously: Public Perceptions of Crime Seriousness' (1996) 36 *British Journal of Criminology* 299; Stelios Stylianou, 'Measuring Crime Seriousness Perceptions - What Have We Learned and What Else Do We Want to Know?' (2003) 31 *Journal of Criminal Justice* 37 and Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [5.3]-[5.5].

Australian Standard of Classification (ASOC) code, was adopted.<sup>10</sup> ‘ASOC 0111: Murder’ is ranked as the most serious (NOI=1) and ‘ASOC 1699: Miscellaneous offences’ as the least serious offence (NOI=155).<sup>11</sup> This analysis employs the model developed by the South Australian Office of Crime Statistics and Research,<sup>12</sup> which groups offences into three broad levels, as follows:

*Table 4-2: Offence seriousness*

Offence seriousness	NOI	Examples of offending
Serious	1 – 61	Homicide; most violent and sexual offences; burglary; conspiracy; perverting the course of justice.
Moderate	62 – 93	Fraud; theft; dangerous or negligent driving.
Minor	94 – 157	Breach of bail and other court orders; trespass; offensive language; various regulatory traffic offences.

#### ***Wholly vs partly suspended sentences***

Most partly suspended sentences involve the judge ordering a sentence of, for example, six months, one month of which is yet to be served and the balance suspended. In some cases, however, the judge takes time spent in custody on remand into account and orders the sentence backdated to that date, with the balance of the sentence from the date of sentencing to be wholly suspended. In order to distinguish between these two sentences, where only one had time yet to be served by the offender, the latter was coded as a wholly suspended sentence of the length of sentence remaining. Accordingly, if, for example, the offender had been in custody for one month and received a six month partly suspended sentence backdated by one month, this was coded as a wholly suspended sentence of five months. This approach was adopted because the latter is a wholly suspended sentence from the time the sentence is ordered by the court, while time spent on remand, over which the judge has no control, is different in nature from the unsuspended portion of a partly suspended sentence.

#### **4.2.1.2 Dataset**

In this section, I set out the information obtained for the Supreme Court dataset. Table 4-3 sets out the information gathered for all offenders:

*Table 4-3: General data fields for 2002-2004 dataset – Supreme Court*

Data field	Details and comments
Date of sentence	Eg 01/02/2004
Sentencing judge	Cox CJ, Crawford, Underwood, Blow, Evans or Slicer JJ
Offender name	Eg Smith, Tom
Offender age and age group	Eg 23 and 18-24
Offender sex	Male/female

<sup>10</sup> For discussion, see Catherine Andersson, 'Development of a National Offence Index for the Ranking of Offences' (Paper presented at the Evaluation in Crime and Justice: Trends and Methods Conference, Canberra, 24-25 March 2003).

<sup>11</sup> The least serious categories listed are in fact ASOC 9998: No data provided' (NOI=156) and 'ASOC 9999: Inadequately described' (NOI=157).

<sup>12</sup> See Elissa Corlett, Grace Skrzypiec and Nichole Hunter, *Offending Profiles of SA Drug Court Pilot*, Office of Crime Statistics and Research, Adelaide (2005) and Grace Skrzypiec, *Offending at 16 to 20 Years of Age*, Office of Crime Statistics and Research, Adelaide (2005).

#### 4. Quantitative analysis

Data field	Details and comments
Principal offence by name and ASOC code <sup>13</sup>	Eg Armed Robbery and ASOC 0611
Principal offence type by name and ASOC division	Eg Property and ASOC 08: Theft and related offences
Offence seriousness	Minor, moderate or serious <sup>14</sup>
Number of counts and counts grouped	Eg 14 and 11-20
Prior convictions	Not stated, nil, minor or significant
Most severe prior sentence	Not stated, nil, non-custodial, suspended sentence or custody
Prior suspended sentence	Yes/no
Plea	Guilty/not guilty
Co-offender	Yes/no
Most severe sentence imposed	Unsuspended, partly suspended or wholly suspended sentence or non-custodial order
Comments	Text field for case details and comments

Where a non-custodial order was imposed, including in combination with a custodial order, the following details were recorded:

*Table 4-4: Data fields for non-custodial orders*

Data field	Details and comments
Type of order	Community service order, probation, compensation, fine, pecuniary penalty, unsupervised release, licence disqualification, recognizance, other
Fine/compensation/pecuniary penalty	Quantum (\$)/adjourned <i>sine die</i> (for compensation)
Probation	Duration (months)
Probation with conditions	Yes/no
Community service order	Duration (hours)

Where a custodial order was imposed, the following details were recorded:

*Table 4-5: Data fields for custodial orders*

Data field	Details and comments
Type of sentence	Unsuspended, partly suspended or wholly suspended
Sentence length/grouped length	Eg 7 months and 6<9 months
Non-parole period	Eg 18 months

For suspended sentences, the following details were recorded:

<sup>13</sup> The Australian Standard Offence Classification (ASOC) was developed by the Australian Bureau of Statistics (ABS) for use in the collection and publication of crime and justice statistics and provides a classificatory framework for the comparison of statistics on offences across Australia: see Australian Bureau of Statistics, *Australian Standard Offence Classification (ASOC)*, Cat No 1234.0, Canberra (1997). The classifications are presently under review: Australian Bureau of Statistics, *Proposed Revisions to the Australian Standard Offence Classification (ASOC), Final Draft*, Canberra, December 2007.

<sup>14</sup> As set out in **Table 4-2**.



*Table 4-6: Data fields for suspended sentences*

Data field	Details and comments
Suspended portion of partly suspended sentence	Eg 3 months
Period to be served of partly suspended sentence	Eg 4 months
Suspension on condition of good behaviour (OCGB)	Yes/no
Other condition imposed	Supervision by probation officer, not commit certain offences, supervision and not commit certain offences, other
Operational period	Duration (years), eg 1.5
Reasons for suspension given	Yes/no
Details of the reasons for suspension <sup>15</sup>	Eg remorse

#### 4.2.2 Magistrates' Court

The vast majority of court matters are resolved in the Magistrates' Court. In 2004-05, for example, there were 60,400 criminal matters lodged and 51,100 matters resolved in the Magistrates' Court,<sup>16</sup> accounting for 99% of all criminal matters in Tasmania.<sup>17</sup> Data for the Magistrates' Court were provided to me by the Tasmanian Department of Justice and include all matters finalised between 1 July 2003 and 30 June 2004 (hereafter '2003-2004'). There were a total of 20,966 finalised cases in the database provided to me by the Department of Justice. Of these, 19,316 related to a sentence imposed by the court.<sup>18</sup> The following chart sets out the cases excluded from my analysis, leaving 10,725 cases for analysis.

*Fig 4.2: Cases excluded from the Magistrates' Court 2003-2004 dataset*

2003-2004 (n=19,316)

- Sentence imposed by a JP (n=6585)
- Sentence imposed on an organisation (n=263)
- Sentence imposed in the Youth Court (n=965)
- Sentence imposed on a juvenile (n=150)\*
- Sentence type 'unknown/not stated' (n=628)

\* This includes cases where the offender was aged 18 or over at the time of sentence but was sentenced to juvenile detention. As no details about length of sentence were provided, these were also excluded.

<sup>15</sup> These will be discussed further in Chapter 5.

<sup>16</sup> These figures include 1,600 and 1,300 Children's Court matters respectively: Steering Committee for the Review of Government Service Provision, *Report on Government Services*, Productivity Commission, Canberra (2006), Tables 6.2 and 6.3.

<sup>17</sup> *ibid*, Table 6.4. Note that matters lodged does not include breaches of penalties, including suspended sentences: see Box 6.4. See also Australian Bureau of Statistics, *Criminal Courts Australia 2003-4*, Cat No 4513.0, Canberra (2005), 4.

<sup>18</sup> There 1,650 offenders who did not have a sentence imposed: 74 were acquitted by court, two were found not guilty on the grounds of mental illness and 1,574 whose charge was 'found unproved'.

#### 4.2.2.1 Data coding issues

There were unfortunately a number of delays with obtaining the data from the Department of Justice and quality control issues with the data which were provided. In this section, the key issues in relation to the data are set out in some detail.

##### ***Name duplications***

Firstly, I endeavoured to remove name duplications from the dataset, for example, where names had slightly different spellings, eg Garry and Gary. Where there were two cases where an offender had the same first, middle and last name(s) and date of birth (DOB), it was assumed that this was the same person. If one entry had a middle name and the other did not but the spelling and DOB were the same, they were again assumed to be the same person. If the name, including the middle name, was the same, albeit with a slightly different spelling, and the DOB corresponded only for two out of three variables (eg the date and month were the same but the years were one or two years apart), it was again assumed to be the same person. If it was a completely different DOB or there was no DOB entered, it was generally assumed to be a different person unless it was a very unusual name.<sup>19</sup> In one instance, a single entry appeared to be a husband and wife and this was separated into two entries.

##### ***Principal vs longest sentence***

The recording rules employed by the Department of Justice dictate that if an offender receives more than one sentence of imprisonment on a single occasion, then the *Term of Imprisonment*, *NonParolePeriod*, *SuspensionType*, *PeriodSuspended* and *Suspension OperationalPeriod* values are taken from the prison sentence with the *longest* term. This means that if on a single occasion, an offender received, for example, a two month unsuspended and a four month wholly suspended sentence, the principal sentence will be recorded as unsuspended, but all the other details will be taken from the wholly suspended sentence. This occurred in respect of 14 offenders who received a partly suspended sentence which was longer than their unsuspended sentence and 28 offenders with a wholly suspended sentence longer than their unsuspended sentence. The data in the 'principal sentence' was taken as determinative of the most serious sentence imposed, even though no information was held as to the length of that sentence (other than that it was shorter than the suspended sentence imposed). There were 18 cases where the principal sentence was a partly suspended sentence but the longest sentence (as recorded in the *SuspensionType* field) wholly suspended. There were also 38 cases, all partly suspended sentences, where the balance of the sentence was suspended, following the remand period. Consistent with the approach taken in respect of the Supreme Court cases, these were recorded as wholly suspended sentences (both as to principal sentence and suspension type).

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<sup>19</sup> Further attempts to gather and analyse data of this nature may need to adopt a more refined 'cleaning approach. For discussion of the approach adopted in NSW, see Don Weatherburn, Bronwyn Lind and Jiuzhao Hua, *Contact with the New South Wales Court and Prison Systems: The Influence of Age, Indigenous Status and Gender*, Crime and Justice Bulletin No 78, Bureau of Crime Statistics and Research, Sydney (2003), Appendix.

**Method of finalisation**

In nine cases, the offender had ‘charge unproven nec’ entered as the method of finalisation but a fine was entered for the principal sentence. This was because the offender had been convicted and then applied successfully to have the conviction set aside. I was advised that the database automatically overrides the method of finalisation but leaves the original penalty in place.<sup>20</sup> Because this is a study of initial sentencing decisions, rather than appeals, and to maintain consistency with the approach taken with the Supreme Court data, the initial sentence was used and the case retained in the dataset. There were four cases where a fine was entered as the principal sentence but a prison order was also imposed, and details as to suspension, length etc provided. This was because the offender had subsequently been dealt with for breach of bail and the prison order related only to that offence. Consistent with the general approach taken as to maintaining the integrity of sentencing decisions at first instance, the data on the prison order were removed and the fine maintained as the principal sentence.<sup>21</sup>

**Unuspended vs period suspended**

There were also some cases where the records showed the principal sentence as an unsuspended sentence and suspension type as ‘No Suspension’, but values were recorded for *PeriodSuspended* and *SuspensionOperationalPeriod*. The Department of Justice advised that in such cases, initially the order was entered as a suspended sentence with values in the *PeriodSuspended* and *Suspension OperationalPeriod* fields. Then on verifying the data, the court would have identified an error and changed the order to *NoSuspension*. When this occurs, the program ‘hides’ the *PeriodSuspended* and *SuspensionOperationalPeriod* fields on the data entry screen, but does not remove the existing values from the two columns. I was therefore told in such cases to ignore the values in the *PeriodSuspended* and *SuspensionOperationalPeriod* columns and to regard the sentence as an unsuspended term of imprisonment.<sup>22</sup>

**4.2.2.2 Dataset**

The following relevant information which was provided by the Department of Justice in an Excel database and then transferred to SPSS for analysis:

*Table 4-7: Data fields for 2003-2004 dataset – Magistrates’ Court*

<b>Data field</b>	<b>Details and comments</b>
Date of sentence	Eg 01/02/2004
Sentencing magistrate	AGS, DJJ, HMW, IRM, MRH, OM, PFD, PHW, RW, SET, SFM, TJH or ZS
Offender name	Eg SMITH, James Adam
Date of birth	Eg 21-JUL-1967
Offender age group	Eg 18-24
Offender sex	Male/female

<sup>20</sup> Email from Jonathon Rees, Department of Justice, to Lorana Bartels, 29 November 2006.

<sup>21</sup> Email from Jonathon Rees, Department of Justice, to Lorana Bartels, 30 November 2006 and Email from Professor Kate Warner to Lorana Bartels, 30 November 2006.

<sup>22</sup> Email from Jonathon Rees, *ibid*.

#### 4. Quantitative analysis

Data field	Details and comments
Number of counts/counts grouped	Eg 14 and 11-20
Plea	Guilty/not guilty/undefended
Method of finalisation	Guilty finding by court, guilty plea by defendant or guilty ex parte
Principal offence/offence type by ASOC code, division and subdivision	Eg 0811: Theft of a motor vehicle, 08: Theft and related offences and 081: Motor Vehicle theft and related offences
Offence seriousness	Minor, moderate or serious <sup>23</sup>
Principal sentence	Unsuspending, partly or wholly suspended sentence, community service order, probation, compensation, fine, GBB/recognizance, licence disqualification or other non-custodial order
Suspension type	No suspension, partly/wholly suspended
Number of prison orders	Non-custodial orders had been coded as .00.
Probation order/CSO/fine	Yes/no
Term of imprisonment	This was initially coded by days but subsequently recoded in months, where 30 days=1 month. These were also grouped as, eg, 1>2 months. Non-custodial orders had been coded as .00.
Period suspended	Unsuspending and wholly suspended sentences and non-custodial orders had been coded as .00. Partly suspended sentences were coded in days, eg 42 days.
Suspension operational period	Months/years. Entries were primarily provided for partly and wholly suspended sentences, however some unsuspended sentences also had an entry.

### 4.3 Discussion of findings

#### 4.3.1 Frequency of suspended sentences

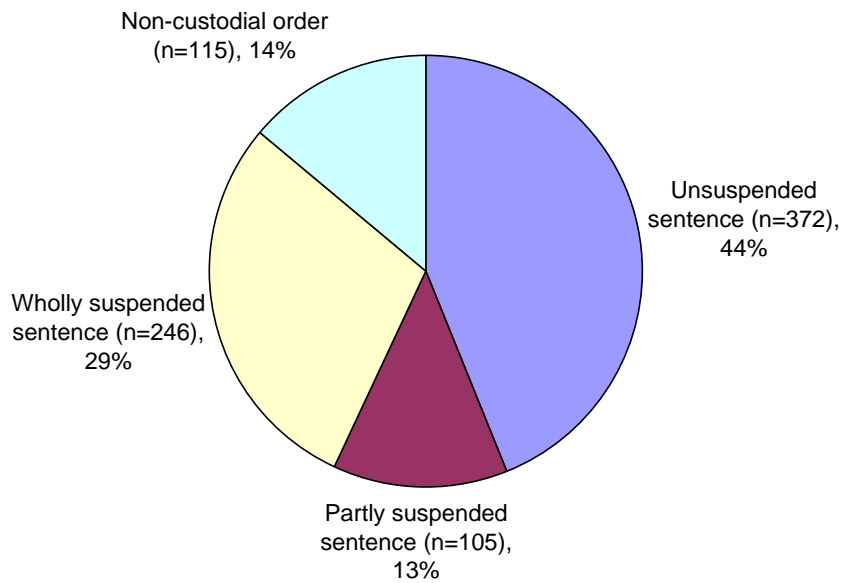
Figure 4.3 sets out the breakdown of sentencing dispositions in the Supreme Court. Unsuspended sentences were the most commonly imposed disposition (44% of all sentences), followed by wholly suspended sentences (29%). Partly suspended sentences and non-custodial orders accounted for 13% and 14% of all sentences respectively.<sup>24</sup> When one considers only custodial sentences, however, it emerges that 51% of such sentences were unsuspended. Wholly suspended sentences represented 34% and partly suspended sentences 15% of all custodial sentences in 2002-2004. In 2000, half of all prison sentences in the Supreme Court were suspended, 26% wholly and 24% partly.<sup>25</sup> Accordingly, although the overall proportion of suspended sentences did not change significantly (from 50% to 49%), wholly suspended sentences were more commonly imposed in 2002-2004, at the expense of partly suspended sentences.

<sup>23</sup> These details were not provided by the Department of Justice but were determined on the basis of the ASOC code.

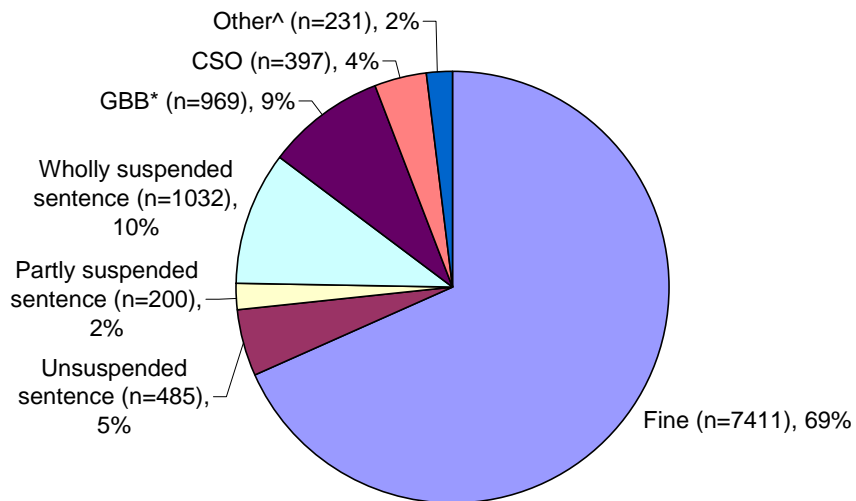
<sup>24</sup> Of the 115 offenders who received a non-custodial order, 45 received a community service order as their most severe penalty. The next most common penalty was a fine (n=32), followed by probation (n=19). Compensation was ordered in 22 cases but always in combination with another order. There were 33 offenders who received a combination of two or more non-custodial orders, most commonly community service and compensation.

<sup>25</sup> Kate Warner, *Sentencing*, Issues Paper No 2, Tasmania Law Reform Institute, Hobart (2002) (Sentencing IP), 62. Note that these data are only for the Southern District.

*Fig 4.3: Sentencing dispositions in the Supreme Court, 2002-2004*



*Fig 4.4: Sentencing dispositions in the Magistrates' Court, 2003-2004*



^ 'Other' sentences is comprised of probation (n=110), compensation orders (n=94), licence disqualification (n=15) and 'other non-custodial order' (n=12). \* GBB includes recognizances, but not where the offender is released on a Commonwealth recognizance release order after receiving a custodial sentence.

Figure 4.4 sets out the distribution of sentencing dispositions in the Magistrates' Court by principal sentence. As can be seen, most sentences imposed in this jurisdiction are non-custodial, with fines alone representing over two-thirds (69%) of all sentences. Wholly suspended sentences were the second most commonly imposed disposition, at 10%, while partly suspended sentences accounted for only 2% of all sentences. Unsuspended sentences represented 5% of all sentences. There were 1,717 custodial sentences in the Magistrates' Court in 2003-2004, accounting for 16% of all sentences. Of these, 60% were wholly and 12% partly suspended and 28% unsuspended.<sup>26</sup> The use of suspended sentences has increased since 1999-2000, when 54% of all custodial sentences in the Magistrates' Court were wholly suspended and 9% partly suspended, with 37% unsuspended.<sup>27</sup>

### 4.3.2 Sentence length

There is no legislative maximum in Tasmania on the length of sentence which can be suspended and on the basis of the present data there appears to be little need to alter this position.<sup>28</sup> It has previously been suggested that in practice, 'it is unusual for a sentence exceeding 12 months to be suspended'.<sup>29</sup> This is confirmed by the present data: less than 7% of wholly suspended sentences were longer than 12 months and there were no such sentences two years, with the same results for the suspended portion of partly suspended sentences.<sup>30</sup> The median length for wholly suspended sentences, at six months, was half that of unsuspended and partly suspended sentences, although offenders on an unsuspended sentence were required to serve a longer period in custody before release than those on a partly suspended sentence.

Table 4-8 sets out information on the range, median and mean lengths of custodial sentences imposed in the Supreme Court in 2002-2004, with statistically significant differences between dispositions in the mean length of sentence imposed.<sup>31</sup>

<sup>26</sup> If the data are taken from the *longest* sentence imposed, rather than the *most severe* means of serving it, the pattern is slightly different: wholly suspended sentences accounted for 63%, partly suspended sentences for 11% and unsuspended sentences for 26%. In other words, 3% of all custodial sentences had a shorter unsuspended or partly suspended sentence together with a longer wholly suspended sentence.

<sup>27</sup> Sentencing IP, n 25, 62.

<sup>28</sup> See discussion [2.2.3] and note in particular data for NSW indicating that sentencers there may be artificially fixing the length of the sentence at two years because that is the maximum period for which a sentence can be suspended.

<sup>29</sup> Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (2nd ed, 2002), [9.202].

<sup>30</sup> Indeed, it has recently been suggested that there were no wholly suspended sentences exceeding two years imposed in the Supreme Court between 2001 and July 2007, and only two cases where the suspended portion of a partly suspended sentence did so: Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008, 27-8. These findings led the TLRI to conclude that 'it is unnecessary to restrict the length of suspended sentences in Tasmania'. The SAC has similarly rejected a proposal to further limit the availability of suspended sentences in Victoria on the basis of sentence length, recommending that the 'current limits on the maximum term of imprisonment...should be retained': Sentencing Advisory Council, *Suspended Sentences: Final Report - Part 1*, Melbourne (2006) (SAC Final Report), Rec 4. For recent data on the length of suspended sentences in Victoria, see Nick Turner, *Suspended Sentences in Victoria - A Statistical Profile*, Sentencing Advisory Council, Melbourne (2007), Figs 7 and 8.

<sup>31</sup>  $F=3.364$ ,  $df=45$ ,  $p<.001$ .

*Table 4-8: Sentence length for custodial sentences – Supreme Court*

<b>Sentence length</b>	<b>Unsuspending sentence (n=372)</b>	<b>Partly suspended sentence (n=105)</b>	<b>Wholly suspended sentence (n=246)</b>
Term – range	1 week – 40 years	3 months – 6 years	1 week – 2 years
Term – median	12 months	12 months	6 months
Term – mean	24 months	15 months	6 months
Period suspended – range	N/A	2 months – 2 years	1 week – 2 years
Period suspended – median	N/A	6 months	6 months
Period suspended – mean	N/A	7 months	6 months

*Table 4-9: Proportion of sentences suspended by length – Supreme Court*

<b>Sentence length</b>	<b>Unsuspending sentence (n=372)</b>	<b>Partly suspended sentence (n=105)</b>	<b>Wholly suspended sentence (n=246)</b>
0>3 (n=40)	35%	0%	65%
3>6 (n=167)	38%	6%	56%
6>9 (n=132)	45%	11%	45%
9>12 (n=77)	48%	14%	38%
12>18 (n=123)	46%	29%	24%
18>24 (n=59)	64%	25%	10%
24>36 (n=49)	65%	29%	6%*
36+ (n=76)	93%	7%	0%
Total (n=723)	51%	15%	34%

\* This figure relates to all sentences of 24>36 months, but the three wholly suspended sentences imposed were in fact of exactly 24 months.

*Table 4-10: Sentence lengths for custodial sentences – Magistrates' Court*

<b>Sentence length</b>	<b>Unsuspending sentence (n=443)</b>	<b>Partly suspended sentence (n=200)</b>	<b>Wholly suspended sentence (n=1,032)</b>
Term – range	3 – 1,460 days	28 – 600 days	7 – 600 days
Term – median	90 days	180 days	60 days
Term – mean	141 days	204 days	80 days
Period suspended – range	N/A	7 – 420 days <sup>32</sup>	7 – 600 days
Period suspended – median	N/A	90 days	60 days
Period suspended – mean	N/A	108 days	80 days

Table 4-10 sets out the lengths of custodial sentences imposed in the Magistrates' Court on the basis of data for the longest sentence imposed, which again demonstrated statistically significant differences in the mean length of sentence for the three groups.<sup>33</sup> Perhaps surprisingly, although the range of sentence lengths was greatest for unsuspended sentences, the median and mean lengths of partly

<sup>32</sup> There were 12 cases where the period suspended was listed as .00. This would seem to mean that the sentence was in fact a wholly, not partly, suspended sentence, even though it was coded as partly suspended for the principal sentence and suspension type. These cases are omitted from the calculations on the period suspended (n=188).

<sup>33</sup>  $F=4.848$ ,  $df=48$ ,  $p<.001$ .

suspended sentences were in fact substantially longer than for unsuspended sentences. Wholly suspended sentences were the shortest form of custodial sentences, with a median of two months, compared with three months for unsuspended and six months for partly suspended sentences. Similar to sentences in the Supreme Court, about half of the term of the partly suspended sentence was generally suspended.

*Table 4-11: Proportion of sentences suspended by length – Magistrates' Court*

Sentence length (months)	Unsuspended sentence (n=443)	Partly suspended sentence (n=200)	Wholly suspended sentence (n=1,032)
0>1 (n=86)	40%	0%	60%
1>2 (n=393)	21%	2%	77%
2>3 (n=327)	22%	5%	73%
3>4 (n=348)	28%	8%	64%
4>6 (n=243)	34%	16%	50%
6>8 (n=135)	29%	25%	46%
12+ (n=99)	51%	38%	11%
Total (n=1,717)	28%	12%	60%

Table 4-11 compares the proportion of custodial sentences suspended by length of sentence, demonstrating a surprisingly high proportion of unsuspended sentences amongst sentences of less than one month (40%). Other than for such sentences, the proportion of sentences wholly suspended decreases as sentence length increases, with the vast majority of sentences of 1>2 months wholly suspended (77%), compared with only a small proportion of sentences of 12 months and over (11%). Although partly suspended sentences accounted for 12% of all custodial sentences, they were disproportionately used for longer sentences, accounting for 43% of sentences of 8>12 months and 38% of sentences 12 months and over.

#### 4.3.2.1 Sentence inflation and net widening

One of the questions to be answered in this discussion is whether there is an increase in the length of a sentence of imprisonment when it is wholly or partly suspended.<sup>34</sup> This phenomenon, which may be entirely unconscious on the part of the sentencer, is referred to as *sentence inflation*, and occurs when the court increases the term of a sentence of imprisonment because it is to be suspended.<sup>35</sup> When Tait examined sentencing patterns in the Magistrates' Court in Victoria, he found an inflation rate of about 50%: in other words, a four month unsuspended sentence appeared to correlate to a six month wholly suspended sentence,<sup>36</sup> with other studies finding similar results.<sup>37</sup> In my interviews with judges and magistrates, the majority of respondents

<sup>34</sup> As discussed in [2.5.2], this approach has been endorsed by the Supreme Court in Canada, but does not seem to be formally permitted in Australia. See also [2.2.3] and [3.4.2], (Q13) for discussion.

<sup>35</sup> Sentence inflation may be regarded as a form of net-widening. For discussion of net-widening, see [1.5.4]. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30, Sydney (2006), [5.86]-[5.93].

<sup>36</sup> David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143, 153.

<sup>37</sup> See Anthony Bottoms, 'The Suspended Sentence in England: 1967-1978' (1981) 21 *British Journal of Criminology* 1, 6-7 and Wendy Searle, Judy Paulin and Tony Waldegrave, 'The Activation of



suggested that it was inappropriate to extend the term of the sentence to reflect the fact of its suspension, but a sizeable minority indicated that they do in fact so from time to time, albeit only to the extent of 'rounding up' the sentence.<sup>38</sup>

One simple means of establishing the existence of any sentence inflation is to compare the lengths of sentences of imprisonment that are to be served immediately with those which are wholly suspended. If the latter are appreciably longer than the former, it would be reasonable to conclude that sentencers are 'inflating' the term of imprisonment for suspended sentences. As Table 4-3 above indicates, the median length of an unsuspended sentence in the Supreme Court is twice that of wholly suspended sentences, while the mean sentence is four times longer.<sup>39</sup> The fact that unsuspended sentences are considerably longer than wholly suspended sentences accordingly seems to fly in the face of any sentence inflation occurring. The figures for the Magistrates' Court in Table 4-10 also contradict the suggestion of inflation, with the median sentence of unsuspended sentences 50% longer than for wholly suspended sentences (90 and 60 days respectively) and the mean sentence almost twice as long (141 and 80 days respectively).

The median length for partly suspended sentences in the Supreme Court was the same as for unsuspended sentences, while the mean sentence was shorter (15 vs 24 months). It is important to note, however, that the median and mean suspended portion of the sentence were six and seven months respectively, so that the portion of the partly suspended sentence to be served is shorter than the term of unsuspended sentences, again contradicting the suggestion of sentence inflation. In the Magistrates' Court, the mean and median length of partly suspended sentences were much higher than for unsuspended sentences, perhaps suggesting some sentence inflation for partly suspended sentences. The median term of partly suspended sentences less the median suspended portion, was, however, at 90 days, exactly the same as the median term of unsuspended sentences, while the mean was less than the mean unsuspended sentence.

Another way of examining the existence of sentence inflation is by use of the so-called 'gap and bulge test' devised by Tait, which operates as follows:

If diversion occurs across the range of sentence lengths, the distributions should be fairly similar. If diversion is more frequent at the bottom end, then the distribution of suspended sentences would tend to be more concentrated near the bottom. If there is sentence inflation, a gap in immediate sentences at the bottom end may be matched by a bulge in suspended sentences further up the ladder.<sup>40</sup>

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Suspended Sentences of Imprisonment in New Zealand' in Philip Spier (ed), *Conviction and Sentencing of Offenders in New Zealand 1989 to 1997*, Ministry of Justice, Wellington (1998) .

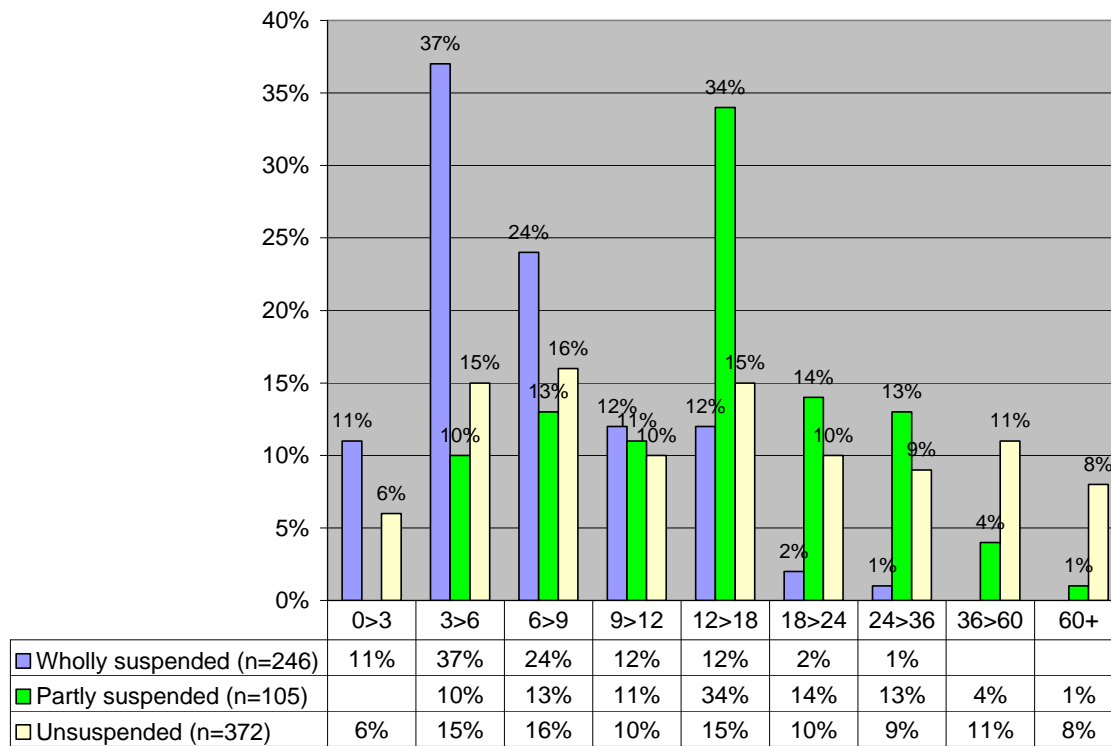
<sup>38</sup> See [3.4.2], (Q13).

<sup>39</sup> This is consistent with earlier findings for the higher courts in South Australia and England where unsuspended sentences in the higher courts were shorter than suspended sentences: see Catherine Dengate, *The Use of Suspended Sentences in South Australia*, Department of Correctional Services, Adelaide (1978), 16 and Bottoms, n 37, 6-7.

<sup>40</sup> Tait, n 36, 153. It should be noted that Tait also undertook multidimensional mapping. It was unfortunately beyond the scope of the present analysis to do this.

#### 4. Quantitative analysis

*Fig 4.5: Distribution of custodial sentences by length (months) – Supreme Court*



*Fig 4.6: Distribution of custodial sentences by length (months) – Magistrates' Court*

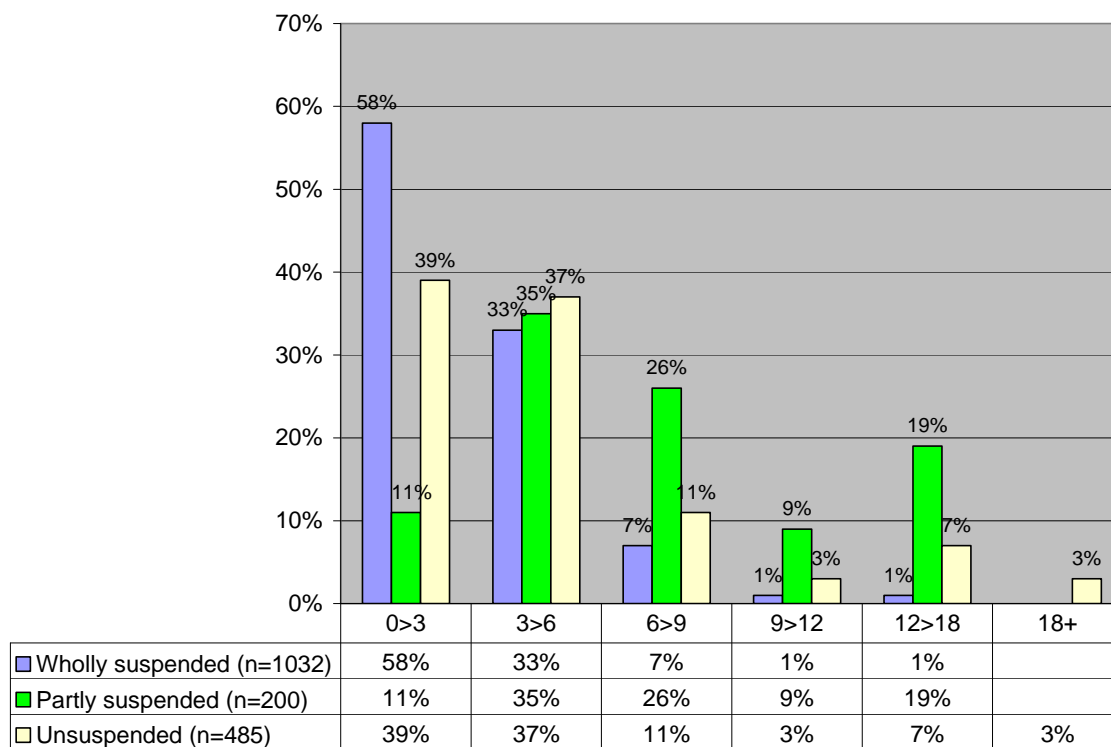


Figure 4.5 sets out the distribution of all custodial sentences in the Supreme Court in 2002-2004. As can be seen, there is a strong tendency to impose very short wholly suspended sentences, with almost half (48%) of all wholly suspended sentences imposed for less than six months, compared with 10% for partly suspended sentences and 21% for unsuspended sentences.<sup>41</sup> Sentences of less than a year accounted for 84% of wholly suspended sentences, compared with only 47% of unsuspended sentences. Tait suggests that such a concentration represents more frequent diversion from the 'bottom end', which may include not only very short unsuspended sentences but also non-custodial orders. There is no significant gap in the use of unsuspended sentences at the lower end, such sentences in fact being fairly evenly distributed, nor is there any bulge of wholly suspended sentences at the higher end of the graph. In fact, the 'bulge' for wholly suspended sentences appears at the lower end, with sentences of three to less than six months (37% of wholly suspended sentences), while sentences of 12 months or longer account for less than 4% of such sentences.<sup>42</sup>

Figure 4.6 sets out the distribution for custodial sentences in the Magistrates' Court. As can be seen, wholly suspended sentences are again heavily concentrated at the bottom end, with sentences of less than three months accounting for 58% of all wholly suspended sentences. Unsuspended sentences are, however, also concentrated at the lower end (39% of sentences under three months), suggesting there is no 'gap' being filled by wholly suspended sentences. Interestingly, sentences of 3>6 months are fairly evenly distributed across the three groups, accounting for 33% to 37% of all custodial sentences.

These data suggest that there is no evidence of sentence inflation occurring in either the Supreme or Magistrates' Court, but the Supreme Court figures in particular may support a theory of net-widening (or penalty escalation), that is, that wholly suspended sentences are being used instead of non-custodial orders, and not as an alternative to an unsuspended sentence. The SAC inferred from data demonstrating that suspended sentences were concentrated amongst shorter sentences that 'it appears that suspended sentences sometimes result in net-widening in Victoria',<sup>43</sup> but also suggested that '[r]ather than showing net-widening, these trends could suggest that courts are quite properly suspending short prison sentences, in recognition of the

<sup>41</sup> The use of short sentences generally appears to be quite high in Tasmania. Data for 2002 indicate that sentences of six months or less accounted for 33% of unsuspended sentences imposed in the Supreme Court, compared with only 1% of such sentences in the District and Supreme Court in NSW: see Jason Keane, Patrizia Poletti and Hugh Donnelly, *Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*, Sentencing Trends and Issues, No 30, Judicial Commission of New South Wales, Sydney (2004).

<sup>42</sup> It is interesting to note that the 'bulge' for partly suspended sentences appears much later, at the 12>18 month mark. Due to the comparatively small numbers of such sentences, however, and the lack of clear gap or bulge for unsuspended sentences, it is difficult to draw any clear conclusions about the interaction of partly suspended and unsuspended sentences in this regard.

<sup>43</sup> SAC Final Report, n 30, [3.33]. The figures for the higher courts indicated that 39% of suspended sentences were less than 12 months, compared with 12% of sentences to be served immediately: [3.35]. In the Magistrates' Court, 78% of sentences were less than six months, compared to 68% of sentences to be served immediately, a finding which was said to 'be consistent with some penalty escalation at the point of initial sentencing': [3.34]

negative effects of such sentences on offenders'.<sup>44</sup> The same observations apply to the Tasmanian data: the data may suggest either net-widening or correct use of suspended sentences.

### 4.3.3 Length of operational period

The amount of penal bite of a suspended sentence is determined in part by the length of the operational period, that is, the period for which the offender is at risk of breach for re-offending. As discussed in Chapter 2, there is no legislative maximum operational period in Tasmania,<sup>45</sup> which has previously been estimated to range between one and four years.<sup>46</sup>

*Table 4-12: Length of operational periods – Supreme Court<sup>47</sup>*

	<b>Partly suspended sentence (n=105)</b>	<b>Wholly suspended sentence (n=246)</b>
Range	6 – 36 months	3 – 48 months
Median	24 months	24 months
Mean	25 months	25 months

*Table 4-13: Length of operational periods – Magistrates' Court<sup>48</sup>*

	<b>Partly suspended sentence (n=161)</b>	<b>Wholly suspended sentence (n=820)</b>
Range	12 – 60 months	6 – 60 months
Median	36 months	24 months
Mean	30 months	26 months

There was a statistically significant correlation between the length of the suspended sentence and the length of the operational period for wholly suspended sentences in both the Supreme Court and Magistrates' Court – that is, the longer the sentence, the longer the operational period imposed.<sup>49</sup> There was however no clear correlation for partly suspended sentences in either court. Tables 4-12 and 4-13 set out information on the length of operational periods for partly and wholly suspended sentences in the Supreme and Magistrates' Courts respectively.

There was no difference in the mean or median length of operational periods for partly and wholly suspended sentences in the Supreme Court, although there was a difference in the range of lengths ordered.<sup>50</sup> It is somewhat surprising to note that not only was the range greater in the Magistrates' Court for both partly and wholly

<sup>44</sup> *ibid*, [3.36].

<sup>45</sup> Cf other Australian jurisdictions: [2.2.3].

<sup>46</sup> Warner, n 29, [9.203]. For recent data on the length of operational periods in Victoria, see Turner, n 31, Figs 9 and 10.

<sup>47</sup> There was one wholly and one partly suspended sentence where no operational period was recorded.

<sup>48</sup> There were 39 partly and 201 wholly suspended cases where no operational period was recorded. There were also nine cases where the sentence was wholly suspended for the duration of a licence disqualification period and two cases of suspension 'for the parole period', but details of these periods were not provided to me and these cases were therefore also excluded.

<sup>49</sup> The correlation coefficients, .294 for the Supreme Court and .255 for the Magistrates' Court, are significantly different from 0 (p-value < 0.001).

<sup>50</sup> Note however that the operational period for a partly suspended sentence commences from the time of the offender's release from prison, and will therefore in practice run for a longer period from the date of sentence, thereby increasing the bite of the sentence.

suspended sentences, but the mean operational period for both types of sentence was also longer in the Magistrates' Court. The median period for partly suspended sentences was also much longer in the Magistrates' Court than in the Supreme Court (36 vs 24 months), although there was no clear explanation for this.

The most commonly ordered operational period for both kinds of suspended sentences in the Supreme Court was two years (59%), followed by three years (18%). Operational periods of less than a year or more than four years each accounted for less than 1% of all operational periods in the Supreme Court. In the Magistrates' Court, two years was also the most commonly ordered operational period for wholly suspended sentences (50%), followed by three years (28%). For partly suspended sentences, by contrast, three years was the most commonly ordered operational period (48%), followed by two years (34%). Short operational periods were again uncommon in the Magistrates' Court, with operational periods of less than one year accounting for 0.5% of wholly suspended sentences and no partly suspended sentences. On the other hand, 7% of partly suspended and 4% of wholly suspended sentences had an operational period of four years or more.

One judge I interviewed suggested he would like to impose longer operational periods, but was aware other judges did not do so, and accordingly, also resisted doing so. Clearly, magistrates do not perceive this constraint, and it may be desirable in some circumstances to impose a longer operational period in order to increase the punitive component of the sentence. The relevance of the length of the operational period on breach rates will be explored further in Chapter 7.<sup>51</sup>

#### 4.3.4 Combination orders

Section 7(i) of the *Sentencing Act 1997* (Tas) (the Act) enables the court to make any combination of orders it sees fit, while section 8(1) provides that a court that orders an offender to serve a term of imprisonment may also impose a community service order, probation order, program rehabilitation order, fine and/or driving disqualification order. The court also has the power to impose a range of orders under the *Crimes Act 1914* (Cth), including, relevantly for the purposes of this discussion, a recognizance release order.<sup>52</sup> As discussed in Chapter 2, the TLRI has recently proposed removing the power to combine a suspended sentence with a community service, probation or program rehabilitation order.<sup>53</sup>

In 2000, a combination order was made in 47% of partly and 55% of wholly suspended sentences in the Supreme Court.<sup>54</sup> In 2002-2004, the figures had risen to 60% and 68% respectively. That there is an increased tendency to make such orders is supported by the statement of one judge that he currently imposes more combination orders than previously, partly due to a public perception that a suspended sentence alone is inadequate punishment. There has also been a change in

<sup>51</sup> See [7.5.4.6].

<sup>52</sup> *Crimes Act 1914* (Cth), s 20(1). For discussion of the use of recognizance release orders, see [2.2] and [3.4.8].

<sup>53</sup> See [2.2.4] for discussion. See also [3.4.3], (Q9) and [6.4.4].

<sup>54</sup> Sentencing IP, n 25, 67.

the types of orders with which the suspended sentence is combined. In 2000, the most common combinations were, in descending order, probation (29% of suspended sentences), community service (12%), compensation orders (9%) and fines or other conditions (2%).<sup>55</sup> In 2002-2004, by contrast, probation was much less popular (12%), while the use of compensation more than doubled, to 23%.<sup>56</sup> The use of fines (including pecuniary penalties) also rose to 7%.

Figure 4.7 sets out the proportion of suspended sentences in which each type of additional order was imposed, although in 45 cases (13%), the offender received more than one additional order.<sup>57</sup> As can be seen, fines were much more commonly combined with wholly suspended than partly suspended sentences (9% vs 2%), while Commonwealth recognizances were much more commonly combined with partly suspended sentences (12% vs 1%). Partly suspended sentences were combined with a fine, probation order and/or community service order in 32% of cases, compared with 49% for wholly suspended sentences, suggesting a stronger desire to add a punitive element to a wholly suspended sentence, where the offender would otherwise suffer no immediate effect of the penalty.

Figure 4.8 sets out the proportion of partly and wholly suspended sentences in the Magistrates' Court where a suspended sentence was combined with a fine, probation or community service.<sup>58</sup> Wholly suspended sentences were most commonly combined with a fine (33%), possibly indicating a desire to add a further penal quotient, while probation was most commonly accompanied by a partly suspended sentence (21%). There are unfortunately no earlier data against which to compare the use of combination orders, nor were data collected on the imposition of other orders, such as compensation.

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<sup>55</sup> *ibid.*

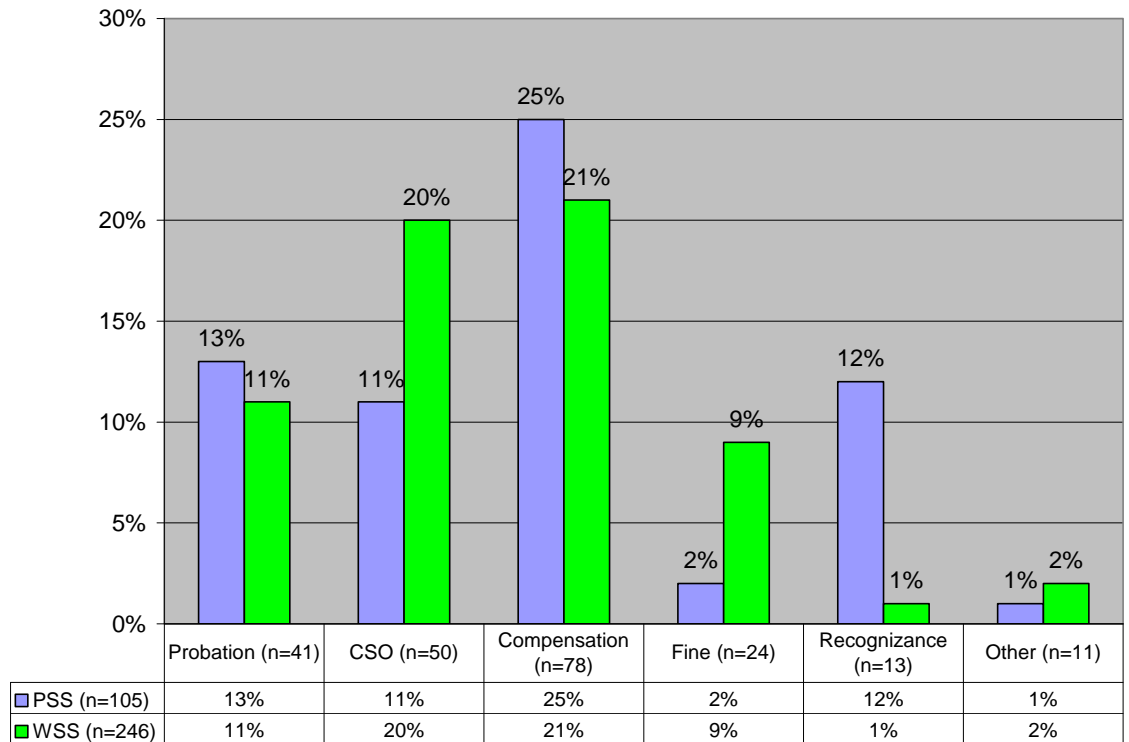
<sup>56</sup> Pursuant to section 68(1)(a) of the Act, where a person is convicted of burglary, stealing or unlawfully injuring property and another person suffers injury, loss destruction or damage as a result, the court must order the offender to pay compensation, with a discretion to make such an order in other cases (subs (b)). Research indicates that compensation orders are still not made in the majority of property cases, and of those made, very few are paid: see Kate Warner and Jenny Gawlik, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36 *Australian and New Zealand Journal of Criminology* 60. For discussion of compensation orders, see also Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86 and R Barry Ruback and Mark Bergstrom, 'Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications' (2006) 33 *Criminal Justice and Behavior* 242, 249-253. Also note the suggestion that 'reparative conditions could be more often attached to community-based sanctions than is now the case': Julian Roberts and Kent Roach, 'Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis' (2005) 9 *Queen's Law Journal* 560, 596.

<sup>57</sup> The sentence was combined with more than one additional order in 15% of wholly suspended sentences (37 cases) and 8% of partly suspended sentences (8%). Figures therefore do not add up to 100%.

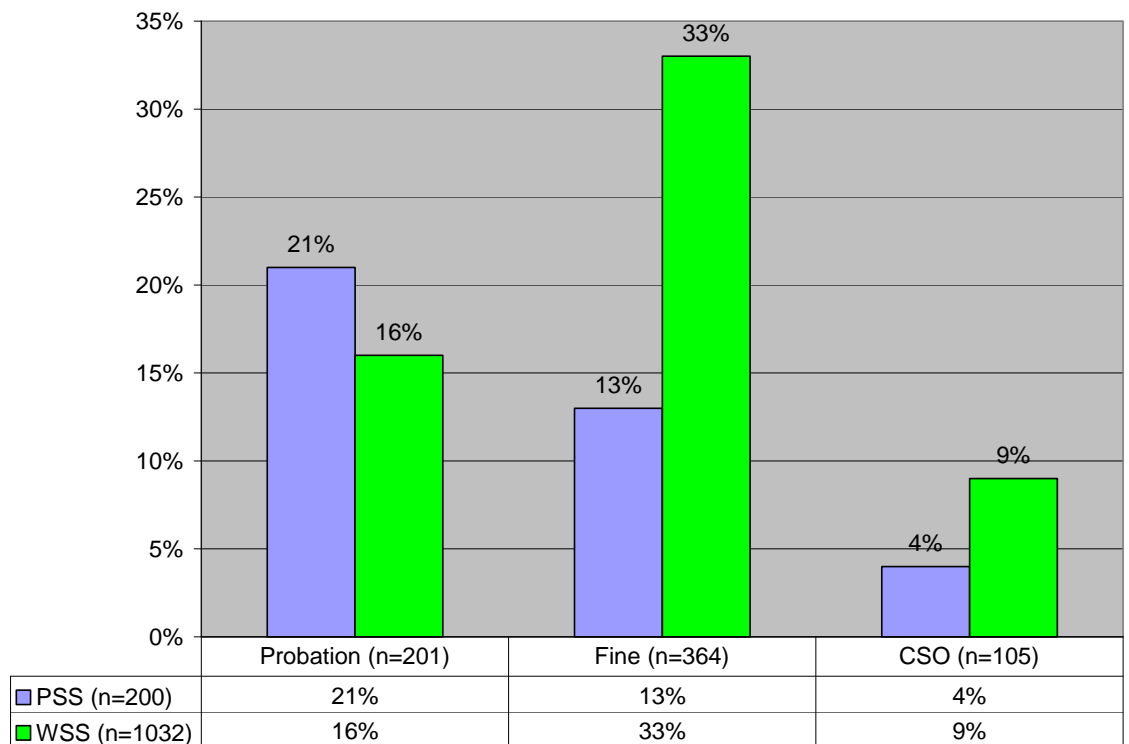
<sup>58</sup> In 87 cases (11 partly suspended; 76 wholly suspended), the offender received more than one additional order. Figures do not add up to 100%

#### 4. Quantitative analysis

*Fig 4.7: Combination orders by suspended sentence – Supreme Court*



*Fig 4.8: Combination orders by suspended sentence – Magistrates' Court*



### 4.3.5 Conditions of suspended sentences

A suspended sentence in Tasmania may be ‘made subject to such conditions as the court considers necessary or expedient’.<sup>59</sup> By far the most common condition imposed in the Supreme Court in 2002-2004, in 260 cases (74% of suspended sentences), was suspension on condition of good behaviour (OCGB). In 125 cases (36%), the offender was subject to some other condition; in 34 cases, this was in addition to suspension OCGB. The most common other condition imposed was a requirement that the offender not to commit a certain kind of offence (23%), most commonly against the *Poisons Act* or *Misuse of Drugs Act*, or simply offences for which prison might be imposed. Figure 4.9 below represents the proportion of all suspended sentences in which each condition was imposed.<sup>60</sup> There are unfortunately no comparable data available on the conditions attached to suspended sentences in the Magistrates’ Court.

#### 4.3.5.1 Probation supervision

Supervision by a probation officer was ordered as a condition of suspension in 38 cases (11%). As noted above, a probation order was imposed in combination with a suspended sentence in a further 41 cases (12%). Offenders were therefore subject to the supervision of a probation officer in some form in 79 cases, or 23%, of suspended sentence cases,<sup>61</sup> although this rose to 34% of suspended sentences where the offender was aged 24 or under. This is substantially lower than the use of supervision in NSW, where a 2005 study found that supervision had been ordered in 68% of cases dealt with in the higher courts since the introduction of suspended sentences there.<sup>62</sup> The reconviction analysis in Chapter 6 reveals that offenders under supervision were more likely to be reconvicted than those on a suspended sentence *simpliciter*.<sup>63</sup> On the other hand, attaching supervision as condition or in combination with a suspended sentence may make the sentencing option more palatable to victims and the public, with magistrates in particular in Chapter 3 indicating strong support for probation. It may therefore be appropriate to undertake further research on the circumstances in which it is appropriate and effective to couple suspended sentences with some form of supervision.

<sup>59</sup> *Sentencing Act 1997* (Tas), s 24. For discussion of conditions which may be attached to suspended sentences in Australia generally, see [2.2.4].

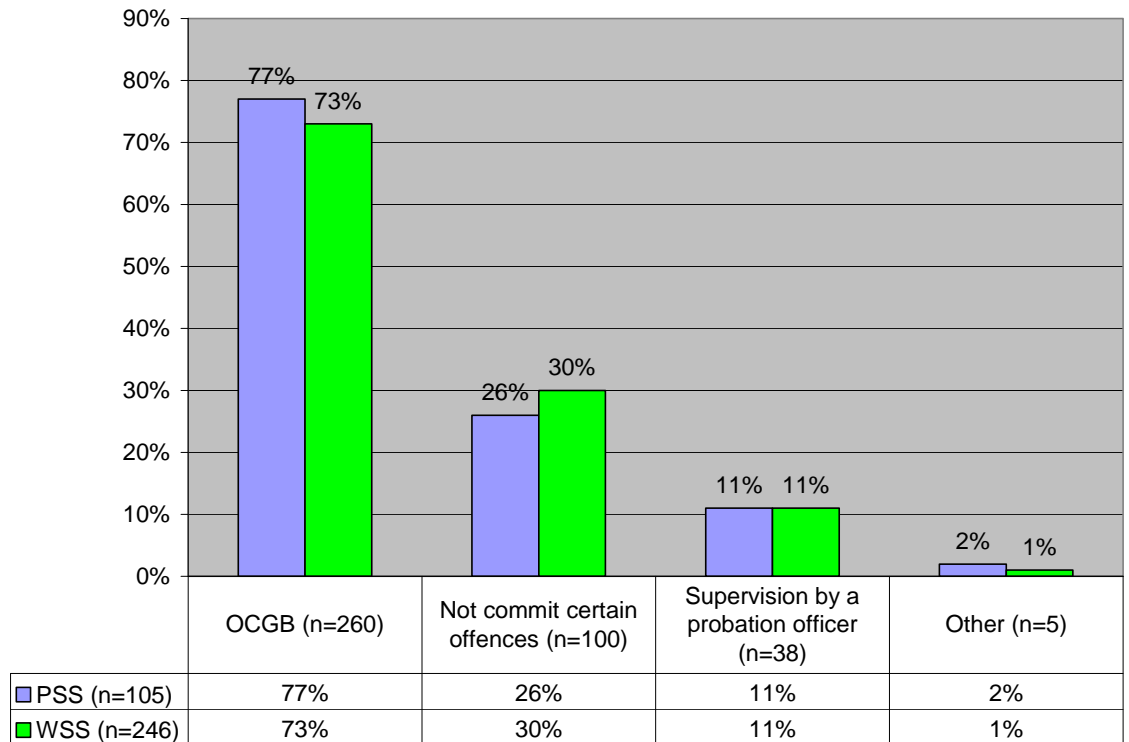
<sup>60</sup> Both supervision and the requirement not to commit certain offences was imposed in four partly and 15 wholly suspended sentences. Figures therefore do not add up to 100%.

<sup>61</sup> In theory, the consequences of a failure to abide by the conditions of a probation order will vary, depending on whether the suspended sentence is ordered in combination with probation or supervision by a probation officer is a condition of the suspended sentence, with the latter exposing the offender to greater potential punishment. It is difficult, however, to draw any firm conclusions about how this difference operates in practice, due to the small number of cases where action is taken on breach. For further discussion of actioned breaches, see [7.5.1].

<sup>62</sup> Poletti and Vignaendra, n 3.

<sup>63</sup> See [6.4.4].



*Fig 4.9: Conditions of suspended sentences – Supreme Court*

#### 4.3.6 Examination of key sentencing variables

##### 4.3.6.1 Offence type

Unlike some other Australian jurisdictions, there is no legislative limitation in Tasmania on the kinds of offences for which suspended sentences are available.<sup>64</sup> Some respondents in Chapter 3,<sup>65</sup> stated that it would be inappropriate to restrict the availability of suspended sentences to specific categories of offences. In 2002-2004, the only offences which came before the Supreme Court where there were no suspended sentences imposed were murder and attempted murder, although suspended sentences were imposed for manslaughter<sup>66</sup> and assisting another to commit suicide.<sup>67</sup> There were also three partly and two wholly suspended sentences imposed for rape<sup>68</sup> but the fact that suspended sentences appear to be only rarely imposed for very serious offences suggests there is no need for offence-based restrictions on the circumstances in which such sentences may be imposed. The TLRI has recently reached a similar conclusion, and in its draft report does not

<sup>64</sup> See [2.2.2.2] for discussion of the limits on the availability of suspended sentences in various jurisdictions.

<sup>65</sup> See [3.4.3], (Q4).

<sup>66</sup> *David Horner* (COPS, Underwood J, 17 March 2003), discussed in [5.3.4.1]. See also [2.2.1], [2.2.2] and [5.3.2.1] for discussion of the use of suspended sentences for homicide offences.

<sup>67</sup> *John Godfrey* (COPS, Underwood J, 26 May 2004), discussed in [5.3.2.1].

<sup>68</sup> Cf Warner, n 29, [11.402]: between 1978 and 2000, only one wholly suspended sentence was imposed for the offence of rape.

recommend the introduction of offence-based restrictions on the power to impose a suspended sentence.<sup>69</sup>

*Table 4-14: Sentencing dispositions by offence type – Supreme Court*

ASOC division <sup>70</sup>	Unsus. sentence (n=372)	PSS (n=105)	WSS (n=246)	Non-custodial order (n=115)
01: Homicide (n=16)	88%	0%	12%	0%
02: Injurious acts (n=170)	41%	13%	33%	13%
03: Sexual assault (n=92)	62%	8%	17%	13%
04: Dangerous acts (n=4)	50%	0%	50%	0%
06: Robbery (n=77)	52%	10%	25%	13%
07: Unlawful entry (n=169)	49%	17%	25%	9%
08: Theft (n=78)	33%	12%	36%	19%
09: Deception (n=34)	26%	35%	32%	6%
10: Drugs (n=58)	34%	12%	45%	9%
11: Weapons (n=3)	0%	0%	67%	33%
12: Property damage (n=64)	47%	5%	31%	17%
13: Public order (n=18)	22%	6%	28%	44%
15: Justice (n=45)	38%	8%	31%	24%
16: Misc. (n=10)	20%	40%	30%	10%
Total (n=838)	44%	13%	29%	14%

Table 4-14 sets out sentencing dispositions by ASOC division for the Supreme Court. In order to assess the significance of differences in outcome, offences with only a small number of cases (ASOC 04 (n=4) and 11 (n=3)) were excluded. Doing so revealed that there were in fact statistically significant differences in sentencing disposition on the basis of ASOC division.<sup>71</sup> An offender was most likely to receive a wholly suspended sentence for drug offences (45%) or theft (36%) and least likely for homicide (12%) and sexual assault (17%), while a partly suspended sentence was most likely to be imposed for miscellaneous (40%) or deception (fraud) offences (35%) and least likely for public order (6%) and property damage (5%). I discuss some of these offences further below.

### **Fraud offences**

It is sometimes said that suspended sentences favour white-collar offenders.<sup>72</sup> Fraud offences, which commonly have as their ‘victim’ corporations and Government agencies, rather than individuals, are generally regarded as white-collar crime, even though a key area of offending, Social Security fraud, does not generally involve white-collar offenders. The fact that the offence is committed against an agency, rather than an individual also does not mean that such offences will be treated

<sup>69</sup> TLRI, n 31, 32.

<sup>70</sup> There were no cases for ASOC 05 (Abduction) or 14 (Traffic).

<sup>71</sup>  $\chi^2=97.291$ ,  $df=33$ ,  $p<.001$ .

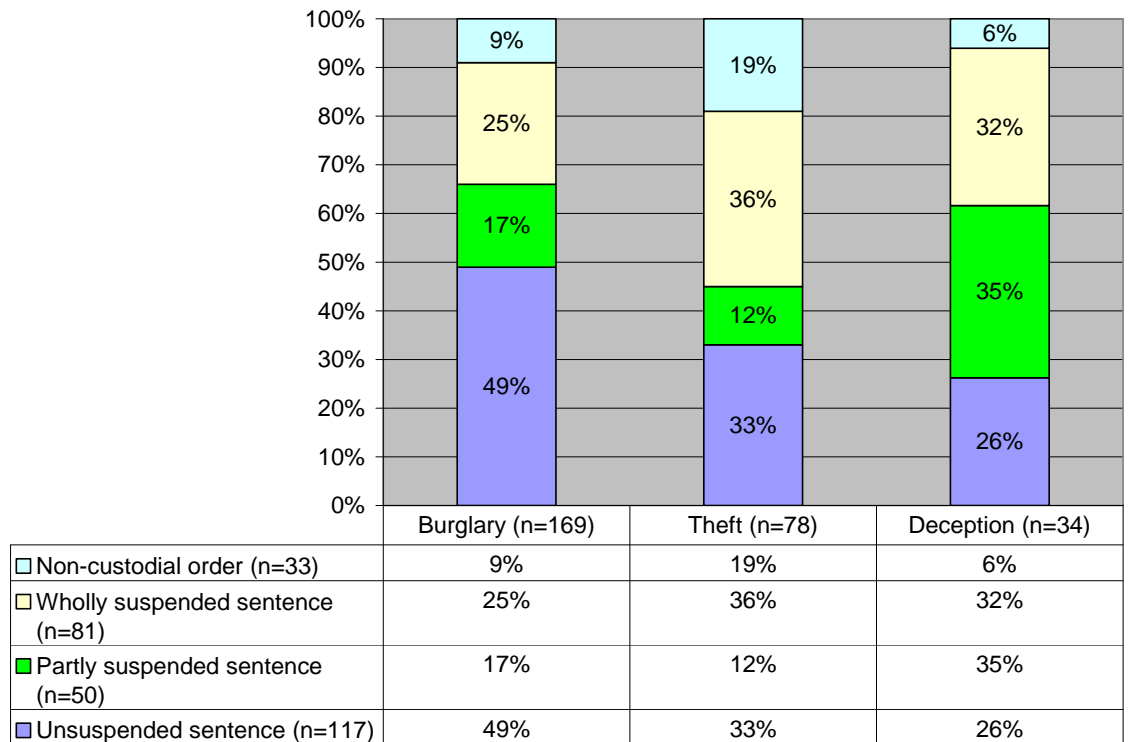
<sup>72</sup> See Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535 and Kate Warner, 'Sentencing Review 1999' (2000) 24 *Criminal Law Journal* 355 and discussion in [1.5.5].

#### 4. Quantitative analysis

leniently by the courts. There is abundant legal authority indicating that fraud is generally regarded as an offence in which general deterrence assumes great relevance, usually requiring that the offender actually serve a period of imprisonment.<sup>73</sup>

The data in this study do not support the suggestion that offenders convicted of fraud will be able to completely avoid serving a term in custody. Rather, it is likely that they will receive partial suspension of their sentence. This is especially so with Social Security fraud: in 2002-2004, there were nine such cases, seven of which resulted in a partly suspended sentence, one in a wholly suspended sentence and one in an unsuspended sentence.<sup>74</sup> These outcomes would seem to be more severe than the national average,<sup>75</sup> but it was not possible on the basis of the available information to ascertain whether these cases were unusually serious or complex cases.

*Fig 4.10: Sentencing dispositions for property offences – Supreme Court*



<sup>73</sup> See *R v Medina* (Unreported, NSWCCA, Clarke JA, Campbell and Allen JJ, 28 May 1990); *R v Fischer* (1995) 65 SASR 194; *R v Scott* (1996) 88 A Crim R 278 (SA CCA); *Chugg v Stanford* (2000) 113 A Crim R 127, [10]; *Hrasky v Boyd* (2000) 9 Tas R 144, [20]; *DPP (Cth) v Milne* [2001] VSCA 93, [13]; *R v Robinson; ex parte A-G (Qld)* [2004] QCA 169 and *R v Brewer* [2004] ACTCA 10, [23]. Cf *Kovacevic v Mills* (2000) 76 SASR 404, [43]; *R v Hinton* (2002) 134 A Crim R 286 (NSWCCA); *R v Buggy* [2006] ACTCA 20 and *R v Townsend* [2007] NSWCCA 215. For a discussion of the principles involved when sentencing for Social Security fraud, see Laws of Australia, *Criminal Sentencing*, Volume 12, Law Book Company, Sydney, [12.4.1320], current as at 13 February 2007.

<sup>74</sup> Ironically, the unsuspended sentence was shorter than the unsuspended portions of any of the partly suspended sentences.

<sup>75</sup> For recent data on Social Security fraud, see Australian Law Reform Commission, *Same Crime, Same Time*, Report 103, Canberra (2006) (ALRC), Appendix 2. For earlier data, see Arie Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at the Fraud Prevention and Control Conference, Surfers Paradise, 24-25 August 2000) and Warner, n 29, [14.708].

Figure 4.10 sets out the sentencing dispositions for the three types of property offences: Burglary (ASOC 07), Theft (ASOC 08) and Deception (ASOC 09) in the Supreme Court, with statistically significant differences in outcomes.<sup>76</sup> An offender convicted of deception offences is much less likely to receive an unsuspended sentence than for burglary (26% vs 49%), but when partly suspended sentences are included, is almost as likely to serve time in custody (61% vs 66%). Offenders convicted of deception offences also received the longest custodial sentences, with a median of 12 and mean of 16 months, compared with nine and 12 months respectively for burglary and seven and 10 for theft offences. As discussed above, fraud offenders also have much less serious prior records than those convicted of theft or burglary.<sup>77</sup> Whereas 76% of offenders convicted of fraud offences were first offenders and only 15% had a significant prior record, only 18% of those convicted of burglary were first offenders, while 60% had a significant record. This may however in part reflect the nature of fraud being charged as multiple counts committed over a period of time rather than as separate offences. The mean number of counts for deception offences was 15, compared with six for burglary and nine for theft, while the median number of counts for deception was three, compared with two for burglary and theft.

On the basis of these data, it cannot be said that offenders convicted of fraud offences ‘get off’ or benefit significantly from the availability of wholly suspended sentences, notwithstanding their apparent lack of prior criminal record. In addition, although such offenders are likely to have a portion of their custodial sentence suspended, the sentences themselves are generally longer than those imposed on offenders convicted of burglary or theft offences, suggesting that offenders convicted of fraud do not appear to be treated lightly by the Court.

### **Drug offences**

Wholly suspended sentences accounted for 45% of all sentences imposed for drug offences in the Supreme Court in 2002-2004,<sup>78</sup> an increase from 37% in 1990-2000. In particular, the use of wholly suspended sentences for trafficking in a narcotic rose from 23% in 1990-2000 to 55% in 2002-2004.<sup>79</sup> The increase in the use of wholly suspended sentences would appear to be at the expense of non-custodial orders: whereas in 1990-2000, non-custodial orders accounted for 48% of sentences imposed for the offence of selling or supplying a prohibited plant or substance, in 2002-2004, no non-custodial orders were imposed for this offence. The small number of cases in

<sup>76</sup>  $\chi^2=20.588$ ,  $df=6$ ,  $p<.05$ .

<sup>77</sup> These differences are highly significant:  $\chi^2=62.727$ ,  $df=4$ ,  $p<.001$ .

<sup>78</sup> South Australia also uses wholly suspended sentences very widely in respect of drug offences. In 2003, 61% of sale and supply cases were resolved by way of wholly suspended sentence: Office of Crime Statistics and Research, *Crime and Justice in South Australia, 2003 - Adult Courts and Corrections*, Adelaide (2004), 81. In 2005, the most recent year for which figures are available, this fell to 56%: Office of Crime Statistics and Research, *Crime and Justice in South Australia, 2005 - Adult Courts and Corrections*, Adelaide (2006), 110. An offender in the NSW higher courts is also disproportionately likely to receive a suspended sentence for certain drug offences: see Sentencing Council, n 3, 15.

<sup>79</sup> Warner, n 29, [13.113].

the latter period (n=7) dictates the need for caution in inferring any trend in sentencing patterns, an observation which has been made previously in Tasmania in relation to drug offences dealt with in the Supreme Court.<sup>80</sup> Any change in sentencing practice is likely to be a result of the introduction of the *Misuse of Drugs Act 2001* (Tas), which was assented to in December 2001 and the main focus of which was ‘persons who are engaged in trafficking drugs’, with ‘[d]ifferential penalties apply[ing] to offenders depending on their degree of participation and culpability’.<sup>81</sup>

#### **Indecent assault**

Although an offender was generally unlikely to receive a wholly suspended sentence for sexual offences (17%), indecent assault was in fact the single offence for which an offender was most likely to receive such a sentence, accounting for 47% of sentences imposed for the offence. Data from 1990-2000 indicate that 41% of single counts and 37% of global counts of indecent assault were wholly suspended.<sup>82</sup> What makes this finding somewhat surprising is that there is a clear statement by the Court of Criminal Appeal suggesting a wholly suspended sentence to be an inappropriate penalty for such an offence. In *Sugg*,<sup>83</sup> Neasey J held that the fact that the sentence was wholly suspended

clearly places the penalty as a whole in a category very different so far as adequacy is concerned from an immediate custodial sentence of that length [nine months] or thereabouts, because the effect of the suspension was to deprive the sentence virtually of all general deterrent effect. These were offences in which the factor of general deterrence was of particular importance in pursuance of the courts’ duty to do what they can to protect children from this kind of sexual depredation.

Table 4-15 sets out sentencing dispositions by ASOC division for the Magistrates’ Court, with statistically significant differences in outcomes.<sup>84</sup> An offender was most likely to receive a suspended sentence for sexual offences,<sup>85</sup> with wholly suspended sentences accounting for 44% and partly suspended sentences for 22% of sentences imposed for sexual offences, although the small number of such cases (n=18) must be noted. An offender was next most likely to receive a suspended sentence for burglary, where wholly suspended sentences accounted for 29% and partly

<sup>80</sup> *Lade v The Queen* (Unreported, Tas CCA, Underwood, Wright and Zeeman JJ, 22 March 1991), 6. See also *R v Dowie* [1989] Tas R 167, 186 (Wright J) and *R v Bangard* (2005) 13 VR 146 in relation to the use of sentencing statistics generally. Cf *Crowley v The Queen* [2003] TASSC 147, [21] (Evans J).

<sup>81</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 21 November 2001, Part 1 (Michael Aird, Leader of the Government in the Council).

<sup>82</sup> Warner, n 29, [11.429]. It is interesting to note that indecent assault was also the offence for which an offender in the NSW higher courts was most likely to receive a wholly suspended sentence: see Sentencing Council, n 3, 15.

<sup>83</sup> *R v Sugg* (Unreported, Tas CCA, Neasey, Cosgrove and Brettingham-Moore JJ, 3 June 1985), 4. For examples of cases in 2002-2004 where a wholly suspended sentence was imposed for indecent assault, see *Raymond Coulson* (COPS, Crawford J, 31 July 2003) and *Rodney Aylett* (COPS, Crawford J, 3 May 2004).

<sup>84</sup>  $\chi^2=3707.582$ ,  $df=72$ ,  $p<.001$ .

<sup>85</sup> Cf the Supreme Court, where sexual offences were amongst the offences least likely to result in a suspended sentence.

#### 4. Quantitative analysis

suspended sentences for 8% of sentences imposed.<sup>86</sup> An offender was least likely to receive a suspended sentence for public order offences, with wholly suspended sentences representing only 1.5% and partly suspended sentences 0.3% of sentences imposed.

**Table 4-15: Sentencing dispositions by ASOC division – Magistrates' Court**

ASOC division <sup>87</sup>	Unsus. (n=485)	PSS (n=200)	WSS (1,032)	Fine (7,411)	GBB (n=969)	CSO (n=397)	Other (n=231)
02:Injurious acts (n=1,050)	8%	3%	15%	39%	23%	8%	3%
03:Sexual assault (n=18)	6%	22%	44%	17%	6%	0%	6%
04:Dangerous acts (n=333)	7%	5%	15%	69%	0%	2%	1%
07:Unlawful entry (n=415)	26%	8%	29%	10%	7%	13%	6%
08:Theft (n=968)	8%	1%	14%	37%	26%	7%	6%
09:Deception (n=320)	9%	3%	12%	39%	17%	13%	7%
10:Drugs (n=578)	2%	1%	9%	66%	15%	6%	2%
11:Weapons (n=143)	3%	1%	6%	71%	18%	1%	0%
12:Property damage (n=322)	3%	1%	6%	61%	13%	7%	10%
13:Public order (n=1,206)	1%	0%	1%	85%	11%	1%	0%
14:Traffic (n=4,687)	2%	1%	8%	86%	0%	1%	1%
15:Justice (n=648)	4%	2%	7%	72%	13%	2%	1%
16:Miscellaneous (n=37)	3%	8%	5%	73%	8%	0%	3%
Total (n=10,725)	5%	2%	10%	69%	9%	4%	2%

#### **Most commonly imposed suspended sentences**

Figures 4.11 and 4.12 set out the ten individual offences for which wholly and partly suspended sentences were most commonly imposed in the Supreme Court, with the number of such cases and proportion of suspended sentences they represent.<sup>88</sup> Overall, the top ten offences represent 80% and 87% respectively of all wholly and partly suspended sentences imposed in the Supreme Court in 2002-2004. As can be seen, both kinds of suspended sentences were most commonly imposed for burglary and assault, which also accounted for the most common offences overall. Whereas fraud accounted for 11% of partly suspended sentences, with a further 4% of partly suspended sentences for fraud against a company, fraud did not feature as an offence for which wholly suspended sentences were commonly imposed.

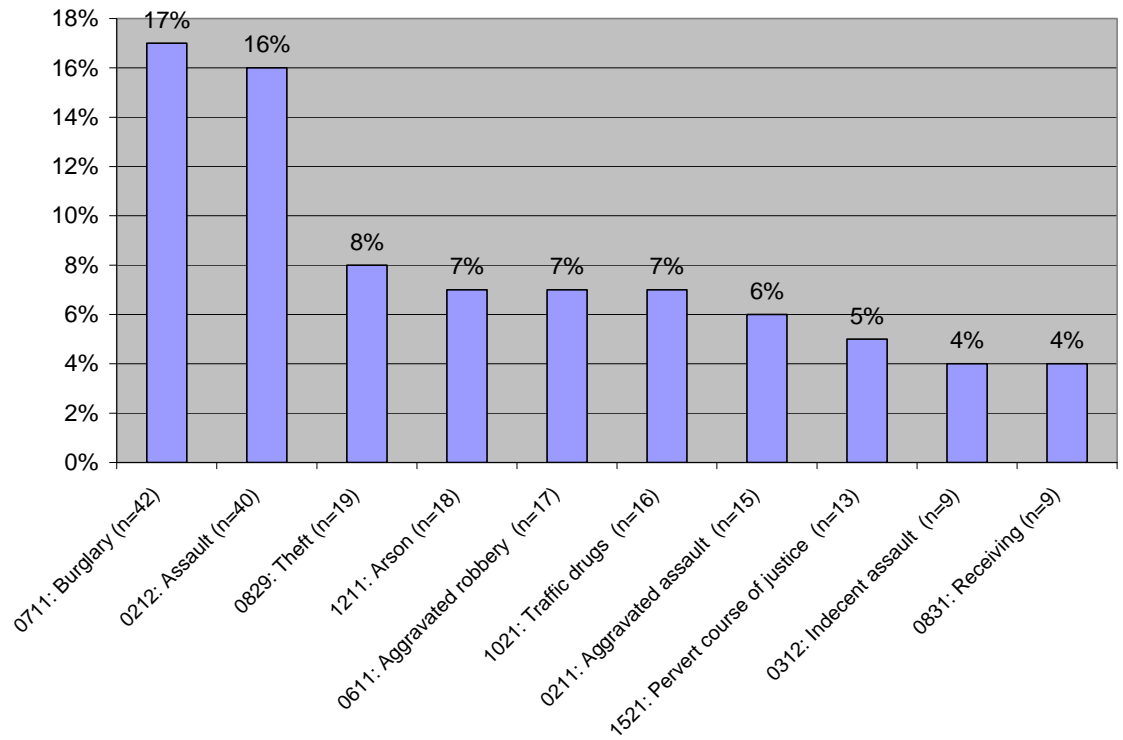
<sup>86</sup> Note that in the Supreme Court, wholly suspended sentences accounted for 25% of sentences imposed for burglary offences, and partly suspended sentences for 17%.

<sup>87</sup> There were no cases for Homicide (ASOC 01), Abduction (05) or Robbery (06).

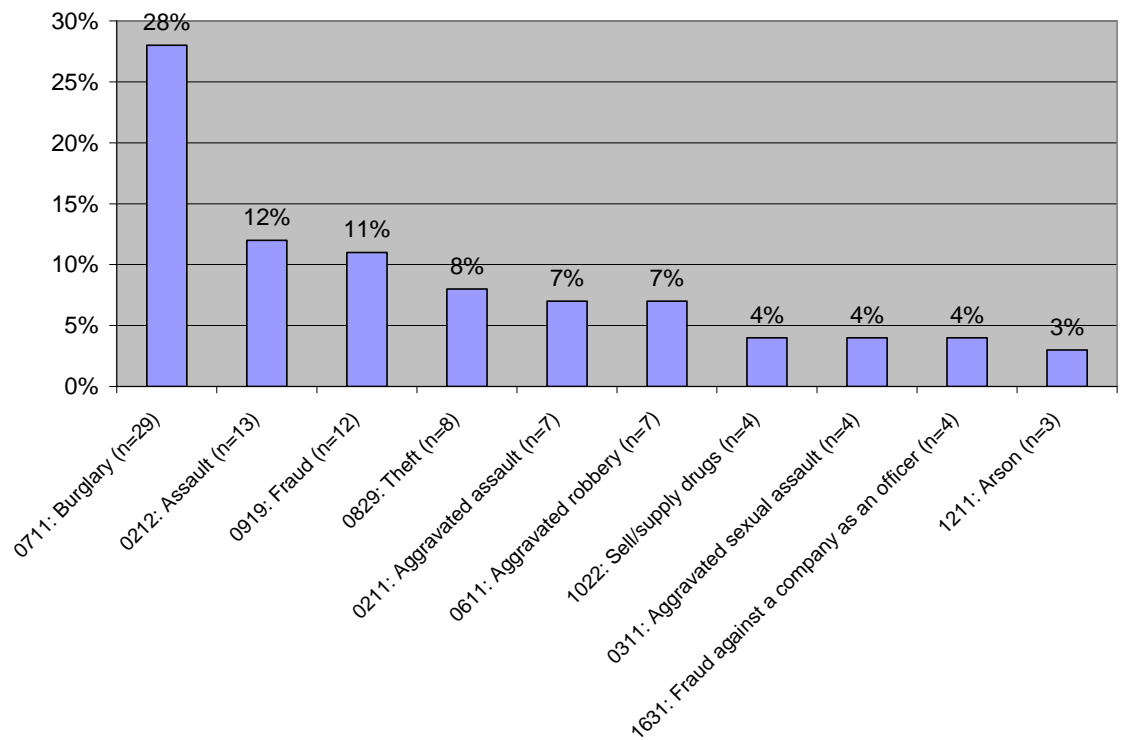
<sup>88</sup> Note that in Figs 4.11 and 4.12, offences are classified by ASOC but I use the terminology employed by the Court when imposing the sentence, eg 'arson' instead of 'property damage by fire or explosion'.

#### 4. Quantitative analysis

*Fig 4.11: Most commonly imposed wholly suspended sentences – Supreme Court*

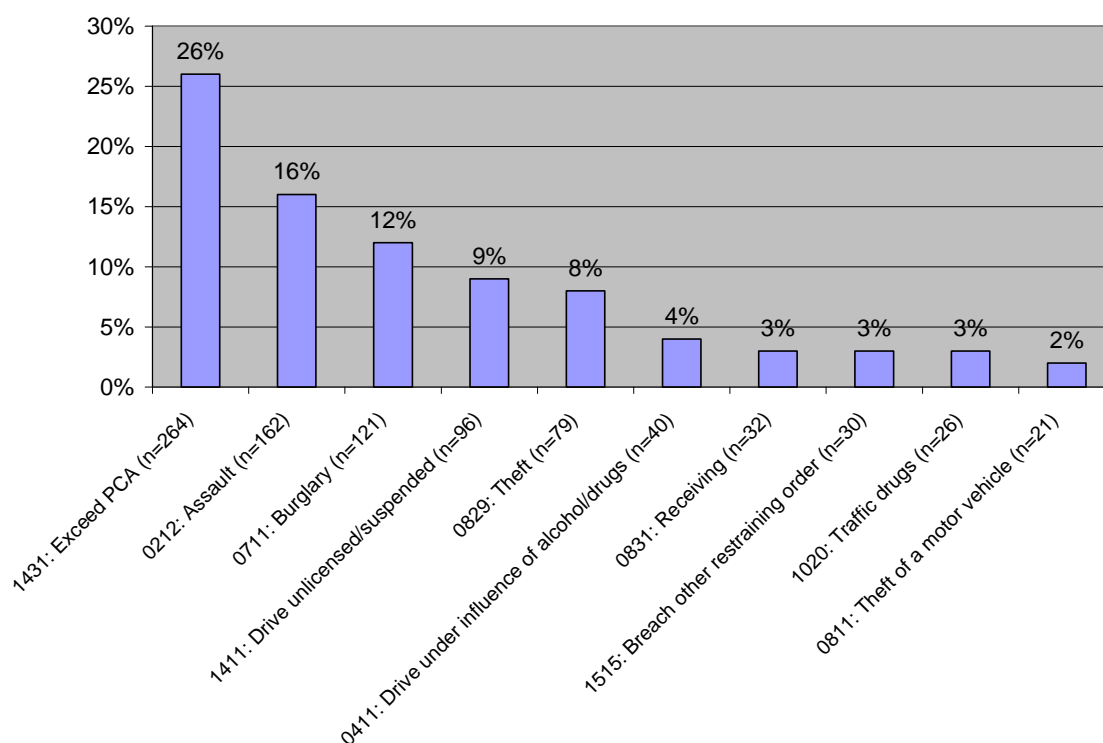


*Fig 4.12: Most commonly imposed partly suspended sentences – Supreme Court*

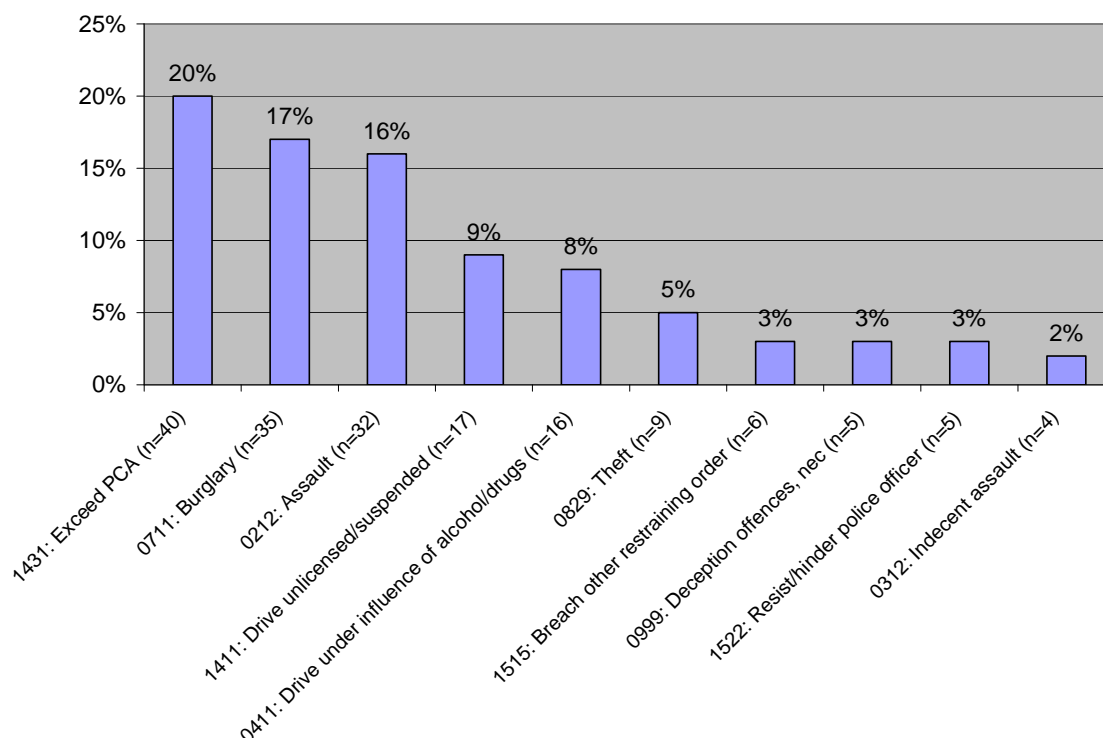


#### 4. Quantitative analysis

*Fig 4.13: Most commonly imposed wholly suspended sentences – Magistrates' Court*



*Fig 4.14: Most commonly imposed partly suspended sentences – Magistrates' Court*



There were 61 individual offences dealt with by the Magistrates' Court in 2003-2004. Figures 4.13 and 4.14 set out the ten offences for which a wholly or partly suspended sentence was most commonly imposed, accounting for 86% and 84% respectively of all wholly and partly suspended sentences. There was significant overlap between the two groups, which had the same top six offences. Drink driving offences (ASOC 0411 and 1431) accounted for 29% of wholly suspended and 28%



of partly suspended sentences, while unlicensed driving accounted for a further 9% of wholly and partly suspended sentences. These data conform with my findings in Chapter 3, where six magistrates nominated driving while disqualified or drink driving as the most appropriate case for the imposition of a suspended sentence.<sup>89</sup>

#### 4.3.6.2 Prior record

Prior criminal record is a key factor in sentencing.<sup>90</sup> There was no information available on prior record for offenders sentenced in the Magistrates' Court; unfortunately I also did not have access to offenders' criminal records at this stage in my analysis and was therefore limited to making my assessment of an offender's record on the basis of the judicial officer's sentencing remarks. Accordingly, in my analysis of the Supreme Court data, each offender's prior record was assessed as 'not stated', 'nil', 'minor' or 'significant' on the basis of comments made by the sentencing judge. This was in turn based on an assessment of the number of prior offences and the seriousness of such offences. It is acknowledged that this approach is something of a subjective assessment: what one judge regards as a significant prior record might be regarded as minor by another judge, while my interpretation of this issue adds a further level of subjectivity. Furthermore, the use of only three levels of prior offending may not be sufficiently sensitive to accommodate all offending patterns. On the other hand, this approach overcomes the limitations of a commonly adopted approach of focusing only on the number of prior offences, without considering their seriousness of such offences. Such analysis would necessarily regard the prior record of an offender who had previously committed two thefts as more serious than that of an offender who has previously committed one rape. Future research in this context would ideally measure prior record on the basis of both the number of offences and the nature of such offences, informed by the offender's full criminal record.

Figure 4.15 sets out sentencing dispositions on the basis of the seriousness of the offender's prior record (ie, nil, minor or significant), demonstrating highly significant differences in outcome,<sup>91</sup> and this outcome was maintained even after controlling for the offender's age and gender, sentencing judge and the seriousness of the index offence.<sup>92</sup>

It is probably unsurprising that the likelihood of receiving a suspended sentence, especially a wholly suspended sentence, is inversely correlated with previous convictions, while unsuspended sentences are most likely for offenders with significant previous offending. Whereas only 9% of offenders with a significant prior record received a wholly suspended sentence, this rose to about 40% of first offenders or those with only a minor record. Somewhat unexpectedly, however, first

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<sup>89</sup> See [3.4.3], (Q4).

<sup>90</sup> For discussion, see [5.3.1.1].

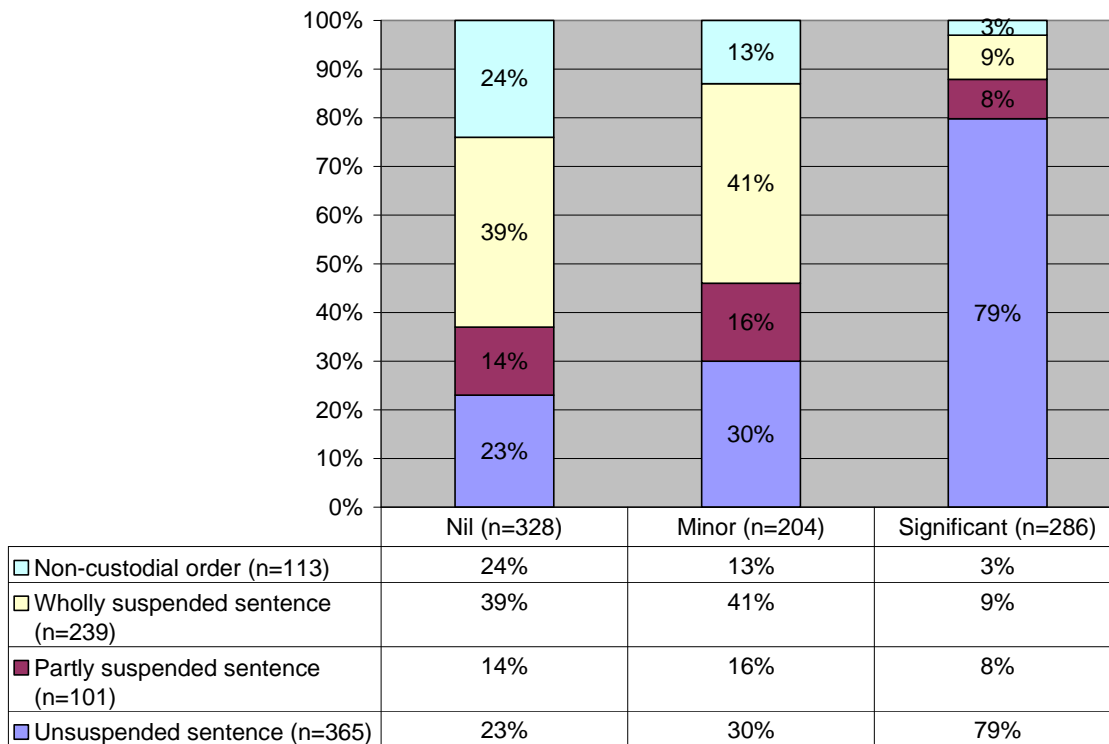
<sup>91</sup>  $\chi^2=234.2$ ,  $df=6$ ,  $p<.001$ .

<sup>92</sup> Note that  $p<.001$  after controlling for these factors, but it is possible that there are other variations in offences committed by first offenders, for example, whether the offence is committed in company, which would also influence sentencing disposition.

#### 4. Quantitative analysis

offenders are much more likely to receive a wholly suspended sentence (39%) than a non-custodial order (24%), which they are in turn only slightly more likely to receive than an unsuspended sentence (23%).

Fig 4.15: Sentencing disposition by prior record – Supreme Court



This finding does not appear to conform with the parsimony principle, which ‘operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose or purposes of the sentence’.<sup>93</sup> The common law requirement that the court is only to impose a suspended sentence where imprisonment would be appropriate in absence of the power to suspend should be borne in mind in this context. It would appear on the basis of these data that judges are treating wholly suspended sentences as a low level form of non-custodial order, a suggestion which is supported by my finding in Chapter 3 that there is inconsistent application of *Dinsdale*.<sup>94</sup> While judicial officers may perceive their actions as lenient, the result is a nominal imprisonment rate of 76% for first time offenders, which would appear to represent little genuine attempt to use imprisonment as a sanction of last resort and suggests that net-widening may be occurring. This would not be a concern if their offending was more serious than that of more seasoned offenders, but this was not the case: whereas 74% of the offences committed by first offenders were serious, this rose to 87% for offenders with a minor record and 90% for offenders with a significant prior record.<sup>95</sup> First offenders were particularly likely to receive a wholly suspended sentence for wounding or offences involving the sale, supply or trafficking of drugs.

<sup>93</sup> ALRC, n 75, [5.9]. See also Warner, n 29, [3.301].

<sup>94</sup> *Dinsdale v The Queen* (2000) 202 CLR 321. For discussion, see [2.2.2.1]-[2.2.2.2] and [3.4.3].

<sup>95</sup> These differences were statistically significant:  $\chi^2=31.206$ ,  $df=4$ ,  $p<.001$ .

#### 4. Quantitative analysis

**Table 4-16: ASOC division by prior record – Supreme Court**

ASOC division	Nil (n=327)	Minor (n=204)	Significant (n=285)
01: Homicide (n=16)	31%	44%	25%
02: Injurious acts (n=167)	34%	31%	35%
03: Sexual assault (n=91)	75%	12%	13%
04: Dangerous acts (n=4)	75%	25%	0%
06: Robbery (n=74)	36%	19%	45%
07: Unlawful entry (n=166)	18%	22%	60%
08: Theft (n=75)	52%	24%	24%
09: Deception (n=34)	76%	9%	15%
10: Drugs (n=56)	36%	41%	23%
11: Weapons (n=3)	33%	33%	33%
12: Property damage (n=60)	38%	28%	33%
13: Public order (n=17)	59%	29%	12%
15: Justice (n=43)	28%	33%	39%
16: Miscellaneous (n=10)	60%	30%	10%
Total (n=816)	40%	25%	35%

Table 4-16 sets out offence types by prior record. First offenders were disproportionately likely to commit sexual offences: 75% of sexual offences were committed by a first offender, compared with 40% of offences overall. This is a somewhat confusing outcome, however, since sexual offences are the offence type least likely to result in a wholly suspended sentence. If one excludes sexual offences, which account for only 7% of wholly suspended sentences, the picture for first offenders becomes even more stark: the use of wholly suspended sentences for first offenders increases from 39% to 45% of all sentences. This may demonstrate too great a reliance on one particular sentencing disposition without sufficiently exploring the appropriateness of true non-custodial alternatives.

**Fig 4.16: Sentencing disposition by previous most severe sentence – Supreme Court**

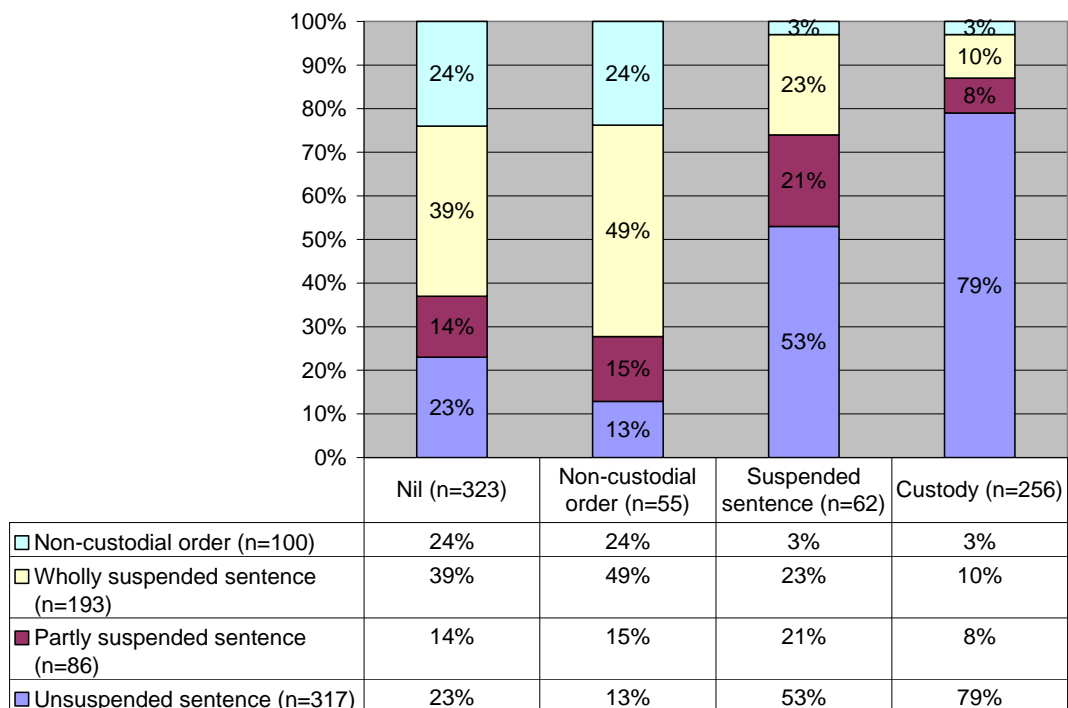


Figure 4.16 reveals another important aspect to this discussion. Once sentences are analysed by the previous most severe sentence, as noted by the judge,<sup>96</sup> there is a startling and highly significant difference in the subsequent sentence received.<sup>97</sup> Put simply, a previous suspended sentence is a strong predictor of a subsequent unsuspended sentence. While this makes sense in terms of an offender receiving an increasingly severe penalty to reflect the fact that s/he has failed to respond to previous more lenient dispositions, when coupled with the information above about wholly suspended sentences being imposed very widely as a penalty for first offenders, it leads to the disquieting inference that offenders may find themselves receiving a custodial sentence even for a minor offence on their second conviction.<sup>98</sup> In particular, it is relevant to note that the likelihood of receiving an unsuspended sentence is more than four times higher for someone who has previously had a suspended sentence than someone with a previous non-custodial order (54% vs 13%).<sup>99</sup> In addition, the chance of receiving a subsequent non-custodial order is equal for offenders who have previously served time in prison as for those who have had a suspended sentence (3%). Ironically, the chance of spending some time in prison, either by way of an unsuspended or partly suspended sentence, is in fact higher for first offenders (37%) than for an offender who has previously received a non-custodial order (27%), while 75% of offenders before the court who are reported to have previously received a suspended sentence are subsequently sent to prison on an unsuspended or partly suspended sentence.

These findings suggest that there may be an inappropriate approach being taken by the Supreme Court in respect of prior criminality, with offenders who have previously been given a suspended sentence being treated as much more serious offenders than those with a previous non-custodial order, even when the former received a suspended sentence for their first offence. Caution should be exercised to ensure that they are not artificially elevated to the second-highest rung on the sentencing ladder, especially for minor or moderate offences, although the results in Chapter 6 suggest, somewhat perplexingly, that first offenders who are required to serve time in custody on an unsuspended or partly suspended sentence were in fact

<sup>96</sup> When a judge noted that an offender had previously served time in custody, it was not generally stated whether this was an unsuspended or partly suspended sentence. References to a previous suspended sentence were, unless stated otherwise, assumed to be wholly suspended sentences.

<sup>97</sup>  $\chi^2=231.444$ ,  $df=9$ ,  $p<.001$ .

<sup>98</sup> The possibility of this trend was adverted to by the SAC: Sentencing Advisory Council, *Suspended Sentences: Discussion Paper*, Melbourne (2005) (SAC DP), 21. The issue had earlier been flagged by Bottoms: Anthony Bottoms, 'The Advisory Council and the Suspended Sentence' [1979] *Criminal Law Review* 437, 439. See also Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the mid-1990s*, Home Office Research Study 180, London (1998), 32 and Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 29.

<sup>99</sup> An earlier English study found that 48% of offenders who had received a suspended sentence for the index offence received a custodial sentence on their first reconviction, compared with 21% of offenders who had previously received probation or supervision. Perhaps even more startling, only 30% of offenders who had previously served a custodial sentence subsequently received one: see GJO Philpotts and LB Lancucki, *Previous Convictions, Sentence and Reconvictions*, Home Office Research Study 53, London (1979), Table 4.6.

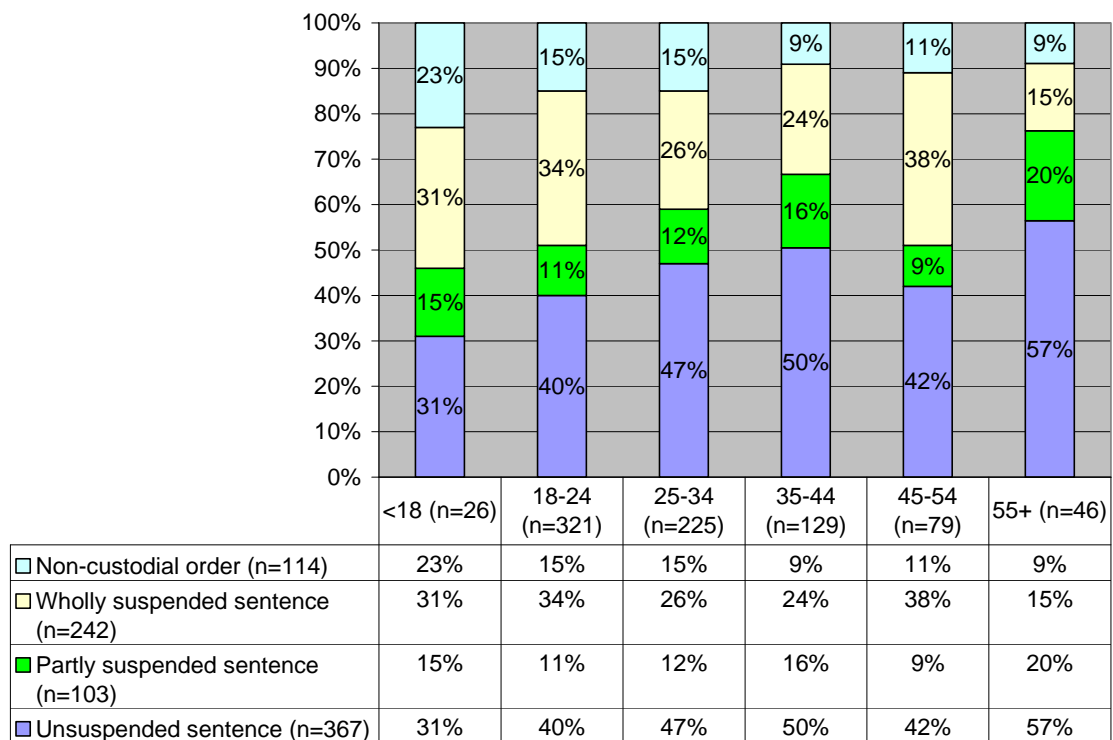
#### 4. Quantitative analysis

less likely to be reconvicted than those in receipt of a wholly suspended sentence or non-custodial order. Notwithstanding these results, the proposal by the TLRI to enact the principle of restraint in the use of imprisonment,<sup>100</sup> which is based on offence seriousness and not prior record, may constitute a partial solution to the inappropriate use of suspended sentences for first offenders.

##### 4.3.6.3 Age

Figure 4.17 sets out sentencing dispositions in the Supreme Court on the basis of age group. Offenders aged 45-54 were most likely to receive a wholly suspended sentence (38% of sentences imposed), followed by offenders aged 18-24 (34%). Partly suspended sentences, by contrast, were most likely to be imposed on offenders aged 55 and over (20%), followed by those aged 35-44 (16%). The differences in sentencing disposition on the basis of offender age were highly significant,<sup>101</sup> and this was maintained even after controlling for gender, prior record, offence seriousness and sentencing judge.<sup>102</sup>

*Fig 4.17: Sentencing disposition by offender age group – Supreme Court*



<sup>100</sup> TLRI, n 31, 7.

<sup>101</sup>  $\chi^2=143.393$ ,  $df=24$ ,  $p<.001$ . This was generally coded as the offender's age at the time of sentence, although some judges recorded only the offender's age at the time of the offence. Where two ages were noted, the analysis is conducted on the basis of the age of the offender at the time of sentence. The age at the time of offence is noted separately and has particular significance for young offenders who were aged under 18 at the time of commission of the offence but were adults by the time they came to be sentenced, as well as in relation to sexual assault cases with a delay of many years or even decades.

<sup>102</sup>  $\chi^2=47.515$ ,  $df=1$ ,  $p<.001$ .

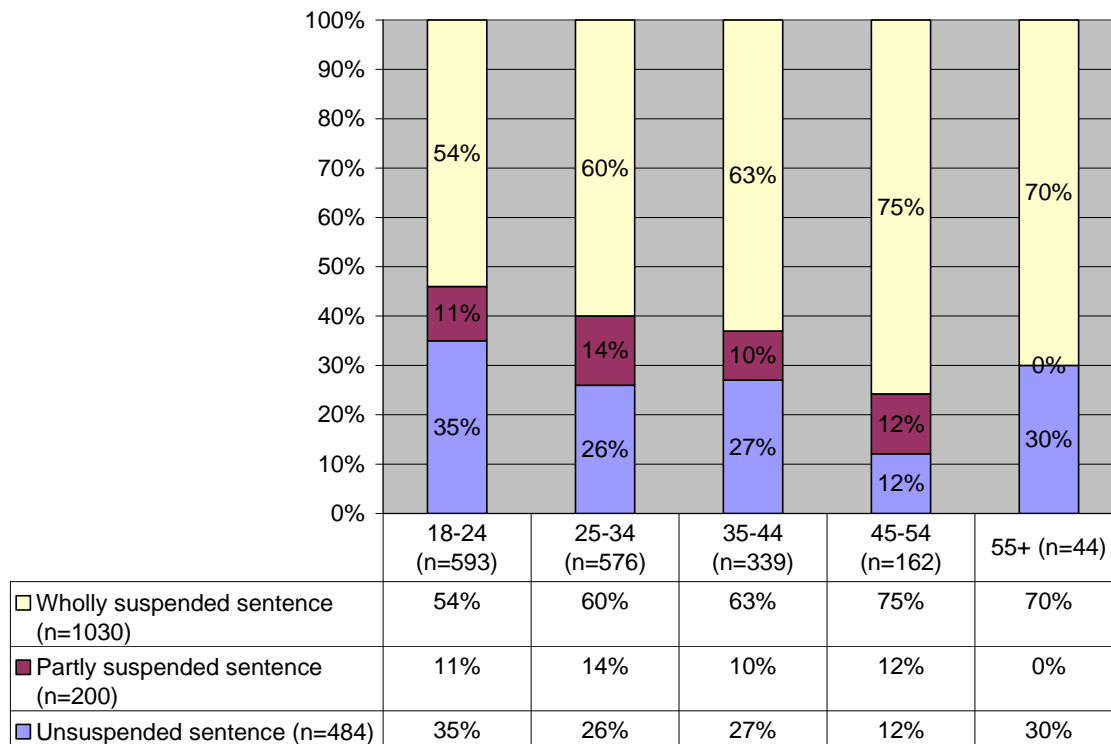
#### 4. Quantitative analysis

There were also highly significant differences in sentencing disposition in the Magistrates' Court on the basis of age group,<sup>103</sup> even after controlling for gender, offence seriousness and sentencing magistrate.<sup>104</sup> Because it is not the focus of this discussion to examine all sentencing dispositions, Table 4-17 only sets out the proportion of custodial sentences which were imposed by age group. As can be seen, offenders aged 25-54, who accounted for 56% of all offenders, were disproportionately likely to receive a custodial sentence (approximately 19%), while those aged 55 and over were least likely to do so (11%). There were also significant differences in the suspension of custodial sentences on the basis of offender age.<sup>105</sup>

*Table 4-17: Proportion of sentences custodial by offender age group – Magistrates' Court*

Age group	Proportion of sentences custodial
18-24 (n=4,296)	14%
25-34 (n=3,219)	18%
35-44 (n=1,818)	19%
45-54 (n=862)	19%
55+ (n=401)	11%
Total (n=10,725)	16%

*Fig 4.18: Custodial sentences by offender age group – Magistrates' Court*



<sup>103</sup>  $\chi^2=143.393$ ,  $df=24$ ,  $p<.001$ .

<sup>104</sup>  $\chi^2=9.453$ ,  $df=1$ ,  $p<.001$ .

<sup>105</sup>  $\chi^2=44.405$ ,  $df=8$ ,  $p<.001$ .

Figure 4.18 sets out the proportion of custodial sentences which were suspended by age group, demonstrating that offenders aged 18-24 were least likely to have their sentence wholly suspended (54%), compared with 75% of offenders aged 45-54. There were also no offenders in the latter group in receipt of a partly suspended sentence, while offenders aged 25-34 were the group most likely to have their custodial sentence partly suspended (14%). Offenders aged 55 and over were least likely to be required to serve a sentence of immediate imprisonment (ie, an unsuspended or partly suspended sentence), at 3% of all sentencing dispositions, compared with 7% for offenders aged 25-44. The relevance of age to the decision to suspend is discussed further in Chapter 5 and reconviction rates analysed by age in Chapter 6.<sup>106</sup>

#### 4.3.6.4 Gender<sup>107</sup>

Women represented 13% of offenders in the Supreme Court in 2002-2004. Figure 4.19 illustrates the differences in sentencing outcomes on the basis of gender; these differences were highly significant,<sup>108</sup> although this was no longer the case in a multi-variate analysis which corrected for age, offence seriousness, prior record and sentencing judge. Women were much more likely to receive a wholly suspended sentence than men (41% vs 28%)<sup>109</sup> and this would appear to be principally at the expense of unsuspended and partly suspended sentences, as they are not much more likely to receive a non-custodial order (16% vs 13%). The overall effect is that men are 16% more likely than women to receive an immediate custodial sentence. This apparent leniency in sentencing is probably due in large part to the fact that women tend to have less serious prior records. Whereas 54% of women were first offenders and only 15% had a significant prior record at the time of sentence, only 38% of men were first offenders while a further 38% had a significant prior record.<sup>110</sup>

<sup>106</sup> See [5.3.1.3]-[5.3.1.4] and [6.4.3.4] respectively.

<sup>107</sup> For discussion of the relevance of gender in the sentencing process generally, see David Biles, 'Prisons and Prisoners in Australia' in Duncan Chappell and Paul Wilson (eds), *The Australian Criminal Justice System*, Butterworths, Sydney (2nd ed, 1977) 337; Carol Hedderman and Loraine Gelsthorpe (eds), *Understanding the Sentencing of Women*, Home Office Research Study 170, London (1997); Craig Dowden and DA Andrews, 'What Works for Female Offenders: A Meta-Analytic Review' (1999) 45 *Crime and Delinquency* 438; Cassia Spohn and Dawn Beichner, 'Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race, and Imprisonment' (2000) 11(2) *Criminal Justice Policy Review* 149; Warner, n 29, [3.511]-[3.513]; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law*, Federation Press, Sydney (2nd ed, 2002); Gill McIvor (ed), *Women Who Offend*, Research Highlights in Social Work 44, Jessica Kingsley, London (2004); Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (4th ed, 2005), [7.3] and ALRC, n 75, [29.13]-[29.28]. For case law discussion, see *R v Friday* (1984) 14 A Crim R 471 (Qld CA) and *Tracey v The Queen* [1987] Tas R 108.

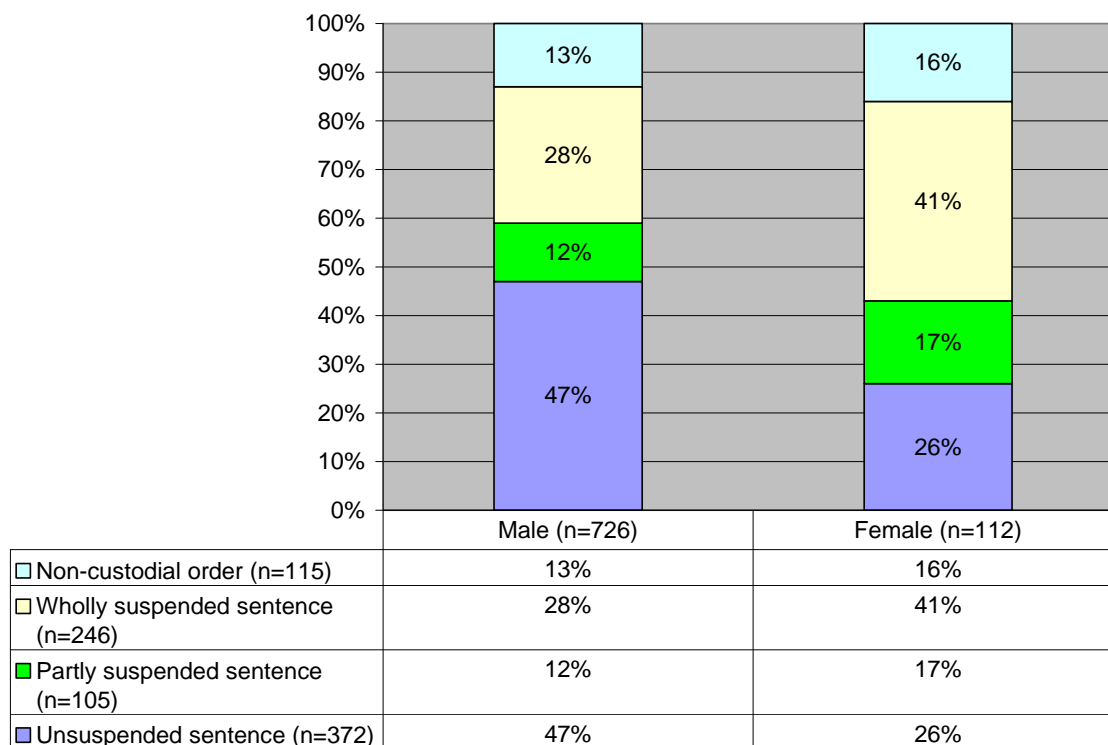
<sup>108</sup>  $\chi^2=18.559$ ,  $df=3$ ,  $p<.001$ .

<sup>109</sup> Cf data in the UK indicating that men were more likely to receive a suspended sentence than women: Hedderman and Gelsthorpe, n 107, 2.

<sup>110</sup> These differences are statistically significant:  $\chi^2=20.894$ ,  $df=2$ ,  $p<.001$ .

#### 4. Quantitative analysis

Fig 4.19: Sentencing disposition by gender – Supreme Court



There are also statistically significant differences<sup>111</sup> in the types of offences committed by women, who are much less likely to be convicted of violent offences, especially sexual assault, and are overrepresented in drug, property and other offences. In particular, women account for 30% of fraud offenders, compared with 13% of offenders overall.<sup>112</sup> In addition, women generally have greater family responsibility, which will be seen in Chapter 5 to be a significant factor in deciding to suspend a sentence.<sup>113</sup> There may also be other explanations for the differences in sentencing outcomes for men and women, but the wider use of wholly suspended sentences may also constitute an example of misuse of suspended sentences in a nominal attempt to deal with them more leniently, but with the possible effect that they are pushed prematurely up the sentencing ladder.

Women represented a higher proportion of offenders in the Magistrates' Court than the Supreme Court, at 20%. Table 4-18 sets out sentencing dispositions in the Magistrates' Court by gender, with statistically significant differences<sup>114</sup> which remained even after controlling for age group, offence seriousness and sentencing magistrate.<sup>115</sup> Although women and men are equally likely to receive the most common penalty, a fine (69%), there are nevertheless differences in the sentences

<sup>111</sup>  $\chi^2=22.974$ ,  $df=5$ ,  $p<.001$ .

<sup>112</sup> This is consistent with a national trend: a recent study found that women represent 21% of prisoners convicted of fraud, compared with 7% of prisoners overall: Janice Goldstraw, Russell Smith and Yuka Sakurai, *Gender and Serious Fraud in Australia and New Zealand*, Trends and Issues in Crime and Criminal Justice, No 292, Australian Institute of Criminology, Canberra (2005), 1.

<sup>113</sup> See [5.3.4.2].

<sup>114</sup>  $\chi^2=161.442$ ,  $df=6$ ,  $p<.001$ .

<sup>115</sup>  $\chi^2=137.122$ ,  $df=1$ ,  $p<.001$ .



#### 4. Quantitative analysis

received for the remaining 31% of cases. In particular, men are more than twice as likely to be required to serve a custodial sentence immediately, with unsuspended and partly suspended sentences together accounting for 7% of sentences imposed on men, compared with only 3% for women. Unlike the Supreme Court, women are less likely to receive a wholly suspended sentence (8% vs 10%) but more likely to receive a non-custodial penalty (90% vs 83%), especially a good behaviour bond (14% vs 8%). These findings suggest women are dealt with more leniently than men in the Magistrates' Court, although the lack of data on offenders' prior record may conceal the true source of any perceived leniency.

*Table 4-18: Sentencing disposition by gender – Magistrates' Court*

<b>Sentencing disposition</b>	<b>Male (n=8,573)</b>	<b>Female (n=2,148)</b>
Fine (n=7,410)	69%	69%
Wholly suspended sentence (n=1,032)	10%	8%
Good behaviour bond (n=969)	8%	14%
Unsuspended sentence (n=485)	5%	2%
Community service order (n=394)	4%	3%
Partly suspended sentence (n=200)	2%	1%
Other (n=231)	2%	3%

It is not possible on the basis of the Magistrates' Court data to analyse offenders' prior criminal records, but part of the difference in sentencing dispositions is again likely due to the statistically significant differences<sup>116</sup> in the types of offences committed by men and women. Table 4-19 sets out the breakdown of offences committed by gender. Women were disproportionately likely to commit deception and theft offences, comprising 39% and 31% of all offenders for those offences respectively. Men, by contrast, accounted for all sexual offences and were especially overrepresented for weapons offences (92%) and burglary (91%). Overall, women were less likely than men to commit serious offences (14% vs 20%).<sup>117</sup>

*Table 4-19: ASOC division by gender – Magistrates' Court*

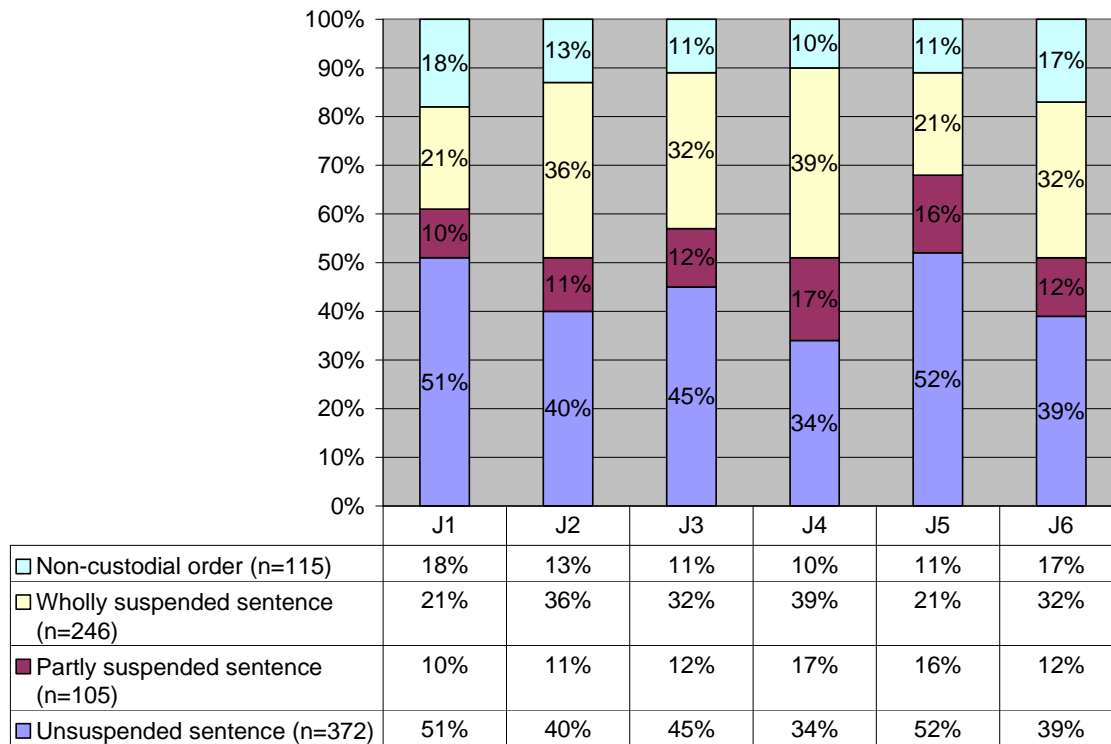
<b>ASOC division</b>	<b>Male (n=8,573)</b>	<b>Female (n=2,148)</b>
02: Injurious acts (n=1,050)	82%	18%
03: Sexual assault (n=18)	100%	0%
04: Dangerous acts (n=333)	84%	16%
07: Unlawful entry (n=415)	91%	9%
08: Theft (n=968)	61%	39%
09: Deception (n=318)	69%	31%
10: Drugs (n=578)	82%	18%
11: Weapons (n=143)	92%	8%
12: Property damage (n=321)	89%	11%
13: Public order (n=1,206)	87%	13%
14: Traffic (n=4687)	79%	21%
15: Justice (n=647)	84%	16%
16: Miscellaneous (n=37)	70%	30%
Total (n=10,721)	80%	20%

<sup>116</sup>  $\chi^2=367.134$ ,  $df=12$ ,  $p<.001$ .

<sup>117</sup> The differences in offence seriousness on the basis of gender were statistically significant:  $\chi^2=75.754$ ,  $df=2$ ,  $p<.001$ .

#### 4.3.6.5 Judicial officer

Fig 4.20: Sentencing disposition by judicial officer – Supreme Court



When an analysis is conducted which endeavours to measure the disparity between judicial officers imposing a sentence, the caveat is commonly provided that there may be significant differences in the nature or severity of the matters coming before each judge or magistrate. In the present analysis, there were no statistically significant differences in the cases coming before each Supreme Court judge as to the age, gender, or prior record of the offender; the rate of guilty pleas; the type or seriousness of the offence or the number of counts.<sup>118</sup> It would therefore seem probable that the following differences in sentencing patterns are due, in some measure, to the idiosyncracies of the individual judges.

Figure 4.20 sets out the sentencing dispositions by sentencing judge, with statistically significant differences,<sup>119</sup> with the result that an offender appearing before one judge has a significant chance of receiving a different type of sentence than if he or she were to appear before another judge.<sup>120</sup> As can be seen, the use of unsuspended sentences ranged from 34% before J4 to 52% before J5, while J4 was almost twice as likely as J1 to impose a wholly (39% vs 21%) or partly (17% vs 10%) suspended sentence. J5 also had relatively low use of wholly suspended sentences, but this was complemented by a higher use of partly suspended sentences.

<sup>118</sup> All had a  $p$  value  $> 0.05$  in a chi-square analysis. Note that there is no correlation between, eg, J1, in this analysis and J1 in Chapter 3, as the Supreme Court bench was differently constituted in the two time periods, due to the retirement of Cox CJ and the subsequent appointment of Tennent J.

<sup>119</sup>  $\chi^2=31.747$ ,  $df=15$ ,  $p<.05$ .

<sup>120</sup> This is confirmed by a log-likelihood analysis:  $\chi^2=29.456$ ,  $df=5$ ,  $p<.001$ .

*Table 4-20: Sentencing disposition by judicial officer – Magistrates' Court*

	<b>Unsus. (n=485)</b>	<b>PSS (n=200)</b>	<b>WSS (n=1,028)</b>	<b>Fine (n=7,401)</b>	<b>CSO (n=395)</b>	<b>GBB (n=967)</b>	<b>Other (n=230)</b>
M1 (n=732)	2.0%	2.9%	11.9%	58.1%	4.8%	15.4%	4.9%
M2 (n=1,161)	3.5%	2.3%	6.2%	83.6%	1.2%	2.0%	1.1%
M3 (n=936)	4.9%	1.0%	5.4%	78.0%	6.5%	3.1%	1.1%
M4 (n=954)	4.6%	0.9%	6.1%	82.5%	1.3%	4.1%	0.5%
M5 (n=777)	5.8%	6.4%	16.7%	60.7%	5.3%	3.2%	1.8%
M6 (n=485)	1.2%	0.4%	7.4%	78.6%	0.8%	10.1%	1.4%
M7 (n=330)	3.0%	0.9%	12.7%	50.9%	7.6%	18.2%	6.7%
M8 (n=1,302)	3.2%	2.6%	8.2%	73.0%	3.7%	8.5%	0.8%
M9 (n=1,237)	6.1%	0.5%	10.3%	66.4%	4.1%	10.5%	2.2%
M10 (n=977)	5.7%	1.0%	13.6%	60.6%	3.8%	12.5%	2.8%
M11 (n=850)	5.3%	1.3%	5.3%	69.5%	2.4%	12.8%	3.4%
M12 (n=965)	6.2%	1.9%	14.5%	53.2%	4.9%	16.3%	3.1%

Table 4-20 sets out the significant differences amongst the magistrates in their use of various sentencing dispositions,<sup>121</sup> although this is likely to be due to differences in the cases appearing before them and may not be evidence of sentencing disparity.<sup>122</sup> It is nonetheless interesting to note that the use of partly suspended sentences ranged from 0.4% before M6 to 6.4% before M5. M5 also imposed wholly suspended sentences most frequently, at 16.7%, compared with 5.3% for M11. The use of unsuspended sentences ranged from 1.2% (M6) to 6.2% (M12), while the use of non-custodial orders ranged from 77% (M12) to 91% (M6).

#### 4.4 Conclusion

This Chapter provides a quantitative analysis of the use of suspended sentences in the Supreme and Magistrates' Courts. In particular, I present information on the frequency of use of suspended sentences, with wholly suspended sentences accounting for 29% of sentences in the Supreme Court and 10% in the Magistrates' Court and partly suspended sentences accounting for 13% and 2% respectively.

<sup>121</sup>  $\chi^2=1003.640$ ,  $df=66$ ,  $p<.001$ . For the purposes of this analysis, I excluded one magistrate, who had only imposed 19 sentences in the relevant period, compared with an average of 892. There is no correlation between, eg, M1 in this analysis and M1 in Chapter 3.

<sup>122</sup> Although there was no statistically significant difference in offender age, there were significant differences in the offences appearing before the magistrates on the basis of gender, offence seriousness and ASOC division. Accordingly, it may well be that the magistrates may not have been sentencing 'like' offences.

Information is presented on the length of suspended sentences and operational periods and the incidence of possible sentence inflation and net-widening explored. My data suggest there is no evidence of sentence inflation occurring in either the Supreme or Magistrates' Court. The Supreme Court figures may support a theory of net-widening, but could equally suggest the appropriate use of suspended sentences for short sentences. My data show that combination orders were imposed in 68% of wholly and 60% of partly suspended sentences imposed in the Supreme Court and accounted for 49% of wholly and 32% of partly suspended sentences in the Magistrates' Court. Information on conditions imposed in the Supreme Court indicates that offenders were most commonly subject to a condition to be of good behaviour; other common conditions were the requirement not to commit a certain kind of offence and supervision by a probation officer.

Information is presented on the offences for which suspended sentences were most commonly imposed and for which an offender was most likely to receive a suspended sentence. The fact that suspended sentences are rarely imposed for very serious offences, coupled with infrequent use of long suspended sentences suggests that there is no need for length- or offence-based restrictions on the availability of suspended sentences, a conclusion supported by the TLRI.<sup>123</sup>

I examine the significance of prior record for offenders in the Supreme Court, although this information was not available for the Magistrates' Court. My analysis demonstrates that wholly suspended sentences were most likely to be used for offenders with no record or a minor record, which is in itself unsurprising, but it is striking to note that a first offender was more likely to receive a wholly suspended sentence than a non-custodial order. Furthermore, analysis of sentencing dispositions by the previous most severe sentence suggests that a previous suspended sentence is a strong predictor of a subsequent unsuspended sentence, making it of vital importance that first offenders are not pushed prematurely up the sentencing ladder. These findings also foreshadow my discussion in Chapter 5 about the possible overuse of wholly suspended sentences for first offenders.

There is currently little information publicly available on the use of suspended sentences in Tasmania, although Warner has published detailed statistical information on sentencing generally.<sup>124</sup> As part of its review of suspended sentences in Victoria, the SAC undertook detailed statistical analysis.<sup>125</sup> This Chapter fills the gap in empirical knowledge by analysing sentencing dispositions by age, gender and judicial officer to provide a comprehensive view of the use of suspended sentences in Tasmania. The findings in this Chapter highlight the need for maintaining readily accessible and up-to-date sentencing information on suspended sentences, so that judicial officers, policy makers, the media and the public are able to inform themselves about the use of this controversial sentencing option.

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<sup>123</sup> TLRI, n 31, 32.

<sup>124</sup> Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (1990); Sentencing IP, n 25 and Warner, n 29.

<sup>125</sup> See SAC DP, n 98, Ch 5.

## 5. QUALITATIVE ANALYSIS

*If suspended sentences are to remain a viable sentencing option the need for transparency and intellectual honesty requires revision regarding the circumstances in which they may be imposed.*<sup>1</sup>

### 5.1 Introduction

Chapter 3 examines my findings of in-depth interviews with judges and magistrates about their views on suspended sentences and in particular, their approach to imposing such sentences. In Chapter 4, quantitative information on the use of suspended sentences in the Supreme and Magistrates' Courts was presented. This Chapter complements those discussions by presenting a content analysis of the relevant factors cited by judges in the Supreme Court when imposing a suspended sentence. It is unfortunately impossible to attempt a similar analysis in respect of magistrates' decisions as their reasons for sentence are not generally transcribed and are therefore available for analysis.

Over 220 factors have been identified which appear to influence courts in passing sentence.<sup>2</sup> Some factors may be aggravating or mitigating, depending on the circumstances, and what one sentencer regards as a mitigating factor, might be perceived by another as neutral or even aggravating.<sup>3</sup> Hayne J observed in *Ryan*<sup>4</sup> that sentencing 'requires consideration and balancing of many different and often conflicting matters'. Consideration of these factors will be determinative not only of the quantum of sentence, but also the manner in which the sentence is to be served. As Perry J of the South Australian Supreme Court observed in *Wacyk*,<sup>5</sup>

It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of the particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender.

A similar approach was endorsed by Kirby J, who stated in *Dinsdale* that 'in determining whether to suspend, one has to look again at all the matters relevant to

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<sup>1</sup> Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 *University of New South Wales Law Journal* 535, 539. See also Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [13.3.2.3].

<sup>2</sup> Shapland identified 229 factors, while a Victorian study identified 292 relevant sentencing factors: see Joanna Shapland, *Between Conviction and Sentence: the Process of Mitigation*, Boston Routledge & Kegan Paul, London (1981), 55 and La Trobe University Legal Studies Department, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts*, La Trobe University, Bundoora (1980).

<sup>3</sup> Andrew Ashworth, 'Disentangling Disparity' in Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing*, Centre for Socio-Legal Studies, Oxford (1987) 24, 31; Mirko Bagaric, *Punishment and Sentencing: A Rational Approach*, Cavendish, Sydney (2001), 19 and Australian Law Reform Commission, *Same Crime, Same Time*, Report 103, Canberra (2006) (ALRC), [6.157].

<sup>4</sup> *Ryan v The Queen* (2001) 206 CLR 267, [133] (Hayne J).

<sup>5</sup> *R v Wacyk* (1996) 66 SASR 530, 536.

the circumstances of the offence as well as those personal to the offender'.<sup>6</sup> According to a recent study undertaken by the Judicial Commission of NSW,

a multitude of factors accounts for the decision to impose a...suspended sentence, more so than the offence itself. The results seem to point to factors currently not available in numeric form exerting a greater influence on the decision than even the plea, bail status and the offender's prior criminal record. For example, the court might give a large consideration to the subjective features of the offence, such as the offender's ability and willingness to rehabilitate, and hardship factors.<sup>7</sup>

The following discussion is a qualitative analysis of the 'multitude of factors' which appear to influence when a suspended sentence will be imposed in the Tasmanian Supreme Court. In presenting this qualitative analysis I do not suggest that the factors considered will always result in a suspended sentence, that these are the only factors which are relevant to the decision to impose such a sentence, or that it is possible to ascertain the relevant weight of each factor in an individual case. As McHugh J noted in *Markarian*,<sup>8</sup>

A sentence can only be the product of human judgment, based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments. The instinctive synthesiser asserts that sentencing is not an exercise in linear reasoning because the result of each step in the process is not the logical foundation for the next step in the process. Nor in practice can it be an exercise in multiple regression where one starts with particular coefficients and adds to or subtracts from their result by changing the weighting of each variable as new variables are added to the process. The circumstances of criminal cases are so various that they cannot be the subject of mathematical equations. Sociological variables do not easily lend themselves to mathematization.<sup>9</sup>

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<sup>6</sup> *Dinsdale v The Queen* (2000) 202 CLR 321 (*Dinsdale*), [85] (Kirby J). The NSW Court of Criminal Appeal has suggested that 'in most cases it is the circumstances individual to the offender which will carry the most weight in determining whether a sentence should be suspended': *R v Lelei* [2001] NSWCCA 229, [30] (Badgery-Parker AJ). Cf research suggesting that in sentencing, the circumstances of the offence are generally given greater weight than those associated with the offender: John Hogarth, *Sentencing as a Human Process*, University of Toronto Press, Toronto (1971), 282.

<sup>7</sup> Patrizia Poletti and Sumitra Vignaendra, *Trends in the Use of Section 12 Suspended Sentences*, Sentencing Trends and Issues, No 34, Judicial Commission of New South Wales, Sydney (2005), 21. See also Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison*, Prison Reform Trust, London (2003), 36.

<sup>8</sup> *Markarian v The Queen* (2005) 215 ALR 213, [52] (McHugh J). For comment, see Kate Warner, 'Sentencing Review 2004-2005' (2005) 29 *Criminal Law Journal* 355. See similarly *Ryan v The Queen* (2001) 206 CLR 267, 294, where Kirby J suggested that 'This court has said many times that sentencing is not a mechanical function but one that involves intuition and judgment'. Note that the principle that sentencing 'is an art, and not a science', as enunciated by Crisp J in *Wise v The Queen* [1965] Tas SR 196, 200, was reaffirmed by the Tasmanian Court of Criminal Appeal in *A-G (Tas) v Blackler* (2001) 121 A Crim R 465, [10]. Cf *Dennison v Tasmania* (2005) 15 Tas R 50, 57.

<sup>9</sup> The term 'instinctive synthesis' originates from the Victorian decision of *R v Williscroft* [1975] VR 292, where Adam and Crockett JJ stated that 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process': 300.

For discussion, see Sally Traynor and Ivan Potas, *Sentencing Methodology: Two tiered or Instinctive Synthesis*, Sentencing Trends and Issues, No 25, Judicial Commission of New South Wales, Sydney (2002); David Brown, 'Popular Punitiveness, the Rise of the "Public Voice" and Other Challenges to Judicial Legitimacy' (Paper presented at the Confidence in the Courts Conference, Canberra, 9-11

Given that sentencing is not a mathematical exercise, my analysis of judges' sentencing comments aims to shed more light on the way judges exercise their sentencing discretion and in particular, the discretion to dangle the Sword of Damocles over an offender's head.

## 5.2 Methodology

Maxfield and Babbie explain that content analysis involves 'the systematic study of messages'. It can be applied, *inter alia*, to speeches and laws, as well as any components or collections thereof and is particularly well suited 'to answering the classic question of communications research: Who says what, to whom, why, how and with what effect?'<sup>10</sup> Judicial sentencing comments as reproduced in the Supreme Court COPS are the public 'voice' of sentencing and provide a fertile ground for analysing sentencing practice.<sup>11</sup> As discussed in Chapter 4, the COPS for all sentences imposed between 1 July 2002 and 30 June 2004 were examined for the 2002-2004 dataset.<sup>12</sup> There were 246 wholly suspended and 105 partly suspended sentences imposed by the Supreme Court in this period. A content analysis was undertaken on the COPS in these 351 cases by recording whether the judge mentioned each of the commonly recognised factors in mitigation set out in Table 5-1 as part of the decision to suspend the sentence.<sup>13</sup>

*Table 5-1: Factors nominated when imposing a suspended sentence*<sup>14</sup>

Assistance to authorities	Bad company	Community interest
Consequences	Drug/alcohol treatment	Employment
Family responsibility	Financial stress	First offender
First taste of prison	Future control	Gambling
Good character	Health	IQ
Last chance/mend ways	Life in order	Low risk
Mental health	Not very serious	Old age
Parity	Personal circumstances	Plea of guilty
Prison extra difficult	Remorse	Restitution
Salutary prison	Studying	Support
Victim's wishes	Youth	Other

February 2007), 8 and Edney and Bagaric, n 1, Ch 2. See also David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15 and Richard Sparks, 'Some Facts of Life' in Paul Halmos (ed), *Sociological Studies in the British Penal Services*, Sociological Monograph No 9, University of Keele (1965) 71, 80.

<sup>10</sup> Michael Maxfield and Earl Babbie, *Research Methods for Criminal Justice and Criminology*, Wadsworth, Belmont (3rd ed, 2001), 329.

<sup>11</sup> For a recent example, see Brigitte Bouhours and Kathleen Daly, 'Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks' (2007) 9 *Punishment and Society* 371. J4 commented in [3.4.4], (Q6) that sentencing reasons in Tasmania tend to be shorter than in some other jurisdictions: the average length of COPS in this study was 461 words, compared with about 1,000 words in Bouhours and Daly's study.

<sup>12</sup> See [4.2.1].

<sup>13</sup> The list of factors to be considered was informed by the Laws of Australia, *Criminal Sentencing*, Volume 12, Law Book Company, Sydney (Laws of Australia) and Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (2nd ed, 2002). Factors in aggravation were not considered, as these would not generally be cited in deciding to impose a suspended, rather than unsuspended, sentence.

<sup>14</sup> It should be noted that not all of these categories were ultimately included in the final discussion. Further details were also obtained about some of these factors.

## 5. Qualitative analysis

Table 5-2 sets out in descending order of frequency the most common reasons given by the court for imposing a suspended sentence.<sup>15</sup>

*Table 5-2: Most common reasons for suspending a sentence*

Reason for suspending sentence	Wholly suspended sentence (n=105)		Partly suspended sentence (n=246)		Total (n=351)	
	n	%	n	%	n	%
First offender	37	35%	110	45%	147	42%
Employment	12	11%	53	22%	65	19%
Drug/alcohol rehabilitation	13	12%	49	20%	62	18%
Youth	15	14%	44	18%	59	17%
Good character	19	18%	35	14%	54	15%
Mental health or intellectual disability	10	10%	34	14%	44	13%
Family responsibility	10	10%	32	13%	42	12%
Guilty plea	10	10%	24	10%	34	10%
Remorse	10	10%	24	10%	34	10%
Adverse personal circumstances	7	7%	25	10%	32	9%
Supportive relationships	5	5%	26	11%	31	9%
Physical health issues	14	13%	16	7%	30	9%
Cooperation/informing	8	8%	16	7%	24	7%
Risk of re-offending	5	5%	15	6%	20	6%
Degree of participation	0	0%	14	6%	14	4%
Gap effect	3	3%	11	4%	14	4%
Moral justification	0	0%	13	5%	13	4%
Consequential loss	3	3%	10	4%	13	4%
Parity	5	5%	5	2%	10	3%
Financial stress	1	1%	8	3%	9	3%
Restitution	3	3%	6	2%	9	3%
Victims' wishes	2	2%	5	2%	7	2%
Old age	1	1%	5	2%	6	2%
Gambling	4	4%	2	1%	6	2%
Delay	4	4%	2	1%	6	2%

More than one factor will generally be cited, and it appears to be the interaction of various factors which ultimately determines the decision to suspend a sentence, with judges listing up to eight factors as relevant to their decision to impose a suspended sentence. On the other hand, in keeping with the finding in Chapter 3 that three judges did not regard it as important to explain their reasoning, there were five cases where was no reason given for suspending the sentence.<sup>16</sup>

<sup>15</sup> Note that I analyse sentencing disposition by offence type and gender in [4.3.6.3]-[4.3.6.4] and therefore will not repeat these issues here.

<sup>16</sup> See eg *Dallas Wilkinson-Reed* (COPS, Crawford J, 19 November 2003) and *Bronson Navaro* (COPS, Evans J, 9 December 2003). It is acknowledged that in these cases, the judge may have had regard to certain factors which were not mentioned in their comments, but the lack of explication gives one cause to suspect that in spite of all exhortations to the contrary, judges may impose such a penalty when 'not quite certain what to do': see *R v O'Keefe* [1969] 1 All ER 426, 429, cited with approval by Kirby J in *Dinsdale*, n 6, [79].

It is in this context relevant to note the following observation: 'In a story that may be apocryphal, it [was] said that some magistrates courts [had] rubber stamps bearing the legendary "nature and gravity of the offence"...reasons are often expressed as terse formula...rather than as thought out justifications specific to individual cases': Catherine Fitzmaurice and Ken Pease, *The Psychology of*



It must be acknowledged that in an analysis of this nature there is necessarily a subjective assessment made as to what constitutes a relevant reason. A 'reason for sentence' has been defined as 'a factor which the sentencer clearly stated to be one which was taken into account in deciding sentence'.<sup>17</sup> In some cases, the sentencing judge expressly stated the relevance of a particular factor to the decision to suspend, while in others it was more obliquely referred to. I therefore sought to be as consistent and systematic in my coding as possible.<sup>18</sup>

### 5.3 Discussion of findings

The discussion in Chapter 3 suggests that judges regard youthful offenders as being particularly appropriate for the imposition of a suspended sentence, while the analysis in Chapter 4 suggested youth and prior criminal record to be significant factors determining whether a sentence is suspended.<sup>19</sup> In this Chapter, the relevance of these and other less quantifiable factors will be examined. In *Lelei*, Badgery-Parker AJ suggested that 'in most cases it is the circumstances individual to the offender which will carry the most weight in determining whether a sentence should be suspended'.<sup>20</sup> I will therefore now discuss the relevance of such factors to the decision to suspend the sentence.

#### 5.3.1 Factors relating to the offender

##### 5.3.1.1 Prior record

All other things being equal, courts will generally sentence repeat offenders more severely than those with lesser criminal records, although it is clear that an offender's record may not be used as a justification for imposing a sentence which is disproportionate to the gravity of the offence.<sup>21</sup> The appropriate means of taking

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*Judicial Sentencing*, Manchester University Press, Manchester (1986), 36, discussed in Cyrus Tata, 'Accountability for the Sentencing Decision Process' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002) 399, 408.

<sup>17</sup> Brian Ewart and Donald Pennington, 'An Attributional Approach to Explaining Sentence Disparity' in Donald Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing*, Centre for Socio-Legal Studies, Oxford (1987) 182, 187.

<sup>18</sup> See Maxfield and Babbie, n 10, 333 for some of the issues which arise in such analyses.

<sup>19</sup> See [3.4.3], (Q4) and [4.3.6.2]-[4.3.6.3].

<sup>20</sup> *R v Lelei* [2001] NSWCCA 229, [30] (Badgery-Parker AJ). Cf research suggesting that in sentencing, the circumstances of the offence are generally given greater weight than those associated with the offender: John Hogarth, *Sentencing as a Human Process*, University of Toronto Press, Toronto (1971), 282.

<sup>21</sup> There appears to be some uncertainty as to whether prior offending merely inhibits mitigation or amounts to aggravation. See discussion in Andreas Kapardis, *Sentencing by English Magistrates as a Human Process*, Asselia Press, Nicosia (1985), 99; Mirko Bagaric, 'Double Punishment and Punishing Character: The Unfairness of Prior Convictions' (2000) 19 *Criminal Justice Ethics* 10; Bagaric, n 3, 230; Warner, n 13, [3.503]; Andrew von Hirsch, 'Record-enhanced Sentencing in England and Wales' (2002) 4 *Punishment and Society* 443; Andrew Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson, London (4th ed, 2005), [6.2.3]; Julian Roberts, 'Reducing the Use of Incarceration: A Review of Strategies' (2005) 86 *Reform* 15, 18; ALRC, n 3, [6.177]; Rec 6-5(b) and Edney and Bagaric, n 1, Ch 9. Note however that the *Criminal Justice Act 2003* (UK) directs sentencers to treat previous convictions as an aggravating factor: for discussion, see Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing*, Prison Reform Trust, London (2007), 1 and von Hirsch, Andrew and Roberts, Julian, 'Legislating Sentencing Principles:

antecedent offences into account was set out by the High Court in *Veen (No 2)*,<sup>22</sup> where it was deemed to be relevant to determine whether the offence is an uncharacteristic aberration or a continuing attitude of disobedience of the law. If the latter, ‘retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted’.

The fact that an offender was a first offender was mentioned as a reason for wholly suspending the sentence in 110 cases,<sup>23</sup> while 128 offenders in receipt of a wholly suspended sentence were first offenders. As set out in Chapter 4,<sup>24</sup> 39% of all first offenders received a wholly suspended sentence, with a further 14% receiving partly suspended sentences. It was argued there that wholly suspended sentences may be over-used for first offenders. The case of *Campbell and Berry*<sup>25</sup> provides a poignant example of how the use of suspended sentences for such offenders may be an excessively harsh penalty. In that case, two offenders set out to steal an ATM, but were intercepted by police after moving away from it and it was accepted by the court that they had voluntarily decided not to proceed with their plan before being apprehended. Evans J sentenced both offenders to a suspended sentence of six months. On the face of it, however, he appears not to have given adequate weight to the differences between the two offenders. Berry was 40 years old and had served numerous prison terms, as well as having previously had the benefit of a suspended sentence. The main factor in mitigation was that he had recently obtained employment for the first time in many years. His co-offender, by contrast was only 18 years old, had no prior convictions, and the judge formed the impression that he was ‘more talk than action’. Notwithstanding the need for parity, I would suggest that it would have been appropriate in the circumstances to impose some lesser sentence on Campbell, in light of his youth and absence of prior convictions. If Campbell were to re-offend, there would be a natural inclination to see him as having already exhausted more lenient options in the sentencing hierarchy, leaving an unsuspended sentence as the next logical step.

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The Provisions of the *Criminal Justice Act 2003* relating to Sentencing Purposes and the Role of Previous Convictions’ [2004] *Criminal Law Review* 639.

Roberts has previously suggested a ‘recidivist premium’, to take the form of a partly suspended sentence, so that ‘the recidivist component is not so much punishment a second time for the same offense but a conditional benefit (suspension of part of the sentence) extended to the offender and withdrawn in the event of reconviction...it would make the consequences of further offending that much more salient to the offender. At some point (perhaps after ten years) the suspended portion of the sentence would extinguish’: Julian Roberts, ‘The Role of Criminal Record in the Sentencing Process’ (1997) 22 *Crime and Justice* 303, 322-3.

<sup>22</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Baumer v The Queen* (1988) 166 CLR 51, [14] (The Court).

<sup>23</sup> This includes cases where the judge did not refer specifically to this issue when giving his reasons for deciding to suspend the sentence, but did refer to the offender’s lack of prior offending in his comments overall. It is accordingly taken to have been an implicit factor in the decision to suspend the sentence. Note that four offenders had no priors at the time of committing the offence for which they were now being sentenced but had in fact since had a sentence imposed for offences committed subsequent to the present offence.

<sup>24</sup> See [4.3.6.2].

<sup>25</sup> *Michael Campbell and Timothy Berry* (COPS, Evans J, 2 October 2003).

### **Gap effect**

One context in which prior record may provide a good opportunity to impose a suspended sentence is in the context of the so-called ‘gap effect’, where an offender has a record of previous offending but there has been a substantial lapse of time since the last conviction.<sup>26</sup> Where the offender has made a genuine attempt to reform, this may justify the imposition of a suspended sentence.<sup>27</sup> There were 14 cases where a gap in offending was given as a reason for suspension, with the gap in offending ranging from two to 30 years and a median period of five years. In *Smith*,<sup>28</sup> for example, the offender participated in a burglary. Blow J decided to impose a suspended sentence and community service order, both of which the offender had received previously, ‘particularly because Mr Smith had stayed out of trouble for some three years before becoming involved in these crimes’.

#### **5.3.1.2 Good character or record**

There is a so-called ‘cardinal rule’ at common law in relation to character that while bad character cannot increase a sentence, good character may operate to reduce the sentence.<sup>29</sup> Slicer J recently stated in *Bullock*<sup>30</sup> that ‘good character, of itself, is not sufficient to warrant exculpation from the need for a substantial penalty for serious crimes.’ The ACT Court of Appeal also considered this issue in relation to Social Security fraud in *Brewer*,<sup>31</sup> stating that:

The otherwise good character of the respondent has no special features that would mark her out for lenient treatment compared with many other persons who, with prior good record, find themselves before the courts in relation to social security fraud. The authorities to which we have referred point out that many offenders in this field will be first offenders of otherwise good character. Good character was reflected in the effective head sentence of only two years...*To take her good character into account again in determining to wholly suspend an already modest sentence was to fall into error of principle.*

On the other hand, when the High Court reviewed the case of a priest who had sexually abused boys in his church over a lengthy period, McHugh, Kirby and Callinan J found the sentencing judge had been in error in refusing to attach any

<sup>26</sup> See *McGrath v The King* (1916) 18 WALR 124 and *R v Piercey* [1971] VR 647. Hogarth found in his study of magistrates that the recency of the offender’s last conviction was the second most important factor influencing a court in the choice of sentence, after length of criminal record: Hogarth, n 6, 101. See also David Thomas, *Principles of Sentencing*, Heinemann, London (2nd ed, 1979), 200-1.

<sup>27</sup> *McCoy and Johnson v Fenton and Smith* [1960] Tas SR 149, 154 (Burbury CJ). See discussion in Warner, n 13, [3.505].

<sup>28</sup> *Danny Smith* (COPS, Blow J, 22 March 2004).

<sup>29</sup> *R v McInerney* (1986) 42 SASR 111, 113 (King CJ). See also *Giles v Barnes* [1967] SASR 174; *R v McInerney* (1986) 42 SASR 111; *R v Sherlock* (Unreported, Tas CCA, Green CJ, Chambers and Nettlefold JJ, 28 August 1975); *Smith v The Queen* (1982) 7 A Crim R 437 and *R v Gillan* (1991) 100 ALR 66. For discussion, see Kate Warner, ‘Sentencing Review 2000-2001’ (2001) 25 *Criminal Law Journal* 332.

<sup>30</sup> *R v Bullock* [2003] TASSC 37, [4].

<sup>31</sup> *R v Brewer* [2004] ACTCA 10, [19] (The Court). Emphasis added. See also *R v Pollard* [2006] NSWCCA 405 and discussion in [4.3.6.1].

weight to the offender's otherwise good character.<sup>32</sup> As Callinan J observed, much, but not all 'of the shine' of the offender's good work had been 'taken off by his gross misconduct in abuse of his office', because character is not 'a one-dimensional feature of any person'.

There were 54 offenders who had good character explicitly taken into account when receiving a suspended sentence, of whom just over half (n=31) had no prior convictions. There is obviously significant overlap between this factor and that of being a first offender, discussed above, but this factor was also applied to offenders whose record indicated only minor previous offending, or that the offence in question was considered to be out of character. Comments about the offender being well thought of in the community or involved in community/volunteer work were also classified here. In *Fletcher-Jones*,<sup>33</sup> for example, Evans J remarked, before partly suspending a two year sentence for aggravated burglary and assault: 'As a volunteer fireman and in other ways you have contributed to your local community. It is a tragedy that by your commission of these crimes you have jeopardised that which you have striven to achieve.'

This is a factor which may particularly benefit white collar offenders, as they are more likely to have strong ties to their community and have their conduct considered an aberration from otherwise law-abiding behaviour. Indeed, Burchett and Higgins JJ of the Federal Court suggested in *McDonald*<sup>34</sup> that 'an equivalent gaol term is plainly a severer punishment for a man like the appellant [an accountant and tax agent] than it would be for many violent criminals, who could take up much the same life upon leaving gaol as they had led before'. This approach to 'respectable offenders' has been criticised on the basis of unfair discrimination in favour of middle class offenders,<sup>35</sup> and it is likely to be one of the factors which gives rise to the perception that suspended sentences are more likely to benefit white collar offenders. Moxon, for example, has suggested that 'suspended sentences are used largely as a means of appearing tough on those who are normally treated leniently anyway: middle class offenders and those with a settled life style'.<sup>36</sup>

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<sup>32</sup> *Ryan v The Queen* (2001) 206 CLR 267, [178] (Callinan J). References omitted. See also [35] (McHugh J); [112] (Kirby J).

<sup>33</sup> *Nigel Fletcher-Jones* (COPS, Evans J, 7 May 2003).

<sup>34</sup> *McDonald v The Queen* (1994) 48 FCR 555, 380.

<sup>35</sup> Warner, n 29, 344.

<sup>36</sup> David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study 103, London (1988), 35. Note a recent study of English sentencers' decisions in 'cusp' cases, where the authors concluded that the emphasis on personal mitigation has a 'differential impact' on offenders from different socio-economic groups', arguing that '[s]ince having a job, home and family are frequently cited as factors militating against custody, offenders who are already socially and economically disadvantaged are likely to suffer further disadvantage in the sentencing process: Hough, Jacobson and Millie, n 7, 42. See also discussion in [1.5.5].

### 5.3.1.3 Youth<sup>37</sup>

When sentencing young offenders, there is an emphasis on rehabilitation.<sup>38</sup> In Tasmania, offenders under the age of 18 are dealt with by the *Youth Justice Act 1997*, which provides, *inter alia*, that a person who was a child at the time of the offence will be dealt with and sentenced as a child, regardless of his or her age when charged, brought before the court, or sentenced.<sup>39</sup> At common law, the general sentencing principles for young offenders continue to apply until the age of 21 or beyond,<sup>40</sup> with authority to suggest that the mitigating effect gradually diminishes throughout the early twenties.<sup>41</sup> In *Jones v Fleming*,<sup>42</sup> Burbury CJ asserted that ‘a juvenile offender should be given every reasonable opportunity to reform, rather than that he should be exposed to the possible corrupting influence of other inmates of the gaol and thereby set on a path of crime’.

The Court of Criminal Appeal recently considered the relevance of youth in the case of *Attorney-General (Tas) v Blackler*.<sup>43</sup> The offender, who was 20 years old at the time of sentence, received a 12 month wholly suspended sentence in combination with a probation order for 20 property offences totalling over \$40,000. The Crown’s appeal was dismissed, with Crawford and Slicer J noting that:

Imprisonment is a punishment of last resort, one reserved for the serious cases, and more so for a young offender. Rehabilitation cannot be achieved through imprisonment in many cases and the fear with a young offender is that imprisonment has the potential for further corruption and may ensure that the youth embarks on a path of crime. If leaving out of prison a young person who has not previously appeared in a court for offences results in the offender not reoffending, then the public will have been well served by the sentence which was selected.<sup>44</sup>

A similar approach was taken by Blow J when dealing with three brothers aged 21, 22 and 28 who pleaded guilty to a series of burglaries and thefts totalling some

<sup>37</sup> Note that this discussion does not consider cases heard in the Children’s Court.

<sup>38</sup> See eg ALRC, n 3, Ch 27 and Edney and Bagaric, n 1, [7.4.1].

<sup>39</sup> *Youth Justice Act 1997* (Tas), s 103. Note however that where the offender is aged 19 years or over at the time of commencement of proceedings, any term of detention imposed by the court is to be served in an adult prison.

<sup>40</sup> See eg *R v Mather and Rogers* [1962] Tas SR 25; *Spaulding v Lowe* (Unreported, Tas SC, Underwood J, 19 February 1985) and *George v The Queen* [1986] Tas R 49.

<sup>41</sup> *Haney v Cochrane* (Unreported, Tas SC, Slicer J, 1 May 1997). See also *McKenna v The Queen* (1992) 7 WAR 455 and discussion in Thomas, n 26, 195 and Edney and Bagaric, n 1, [7.4.1].

<sup>42</sup> *Jones v Fleming* [1957] Tas SR 1, 4. See also *Lahey v Sanderson* [1959] Tas SR 17, 21; *Mathers v Rogers* [1962] Tas SR 25; *Mathers v Rogers* [1962] Tas SR (NC 25); *Arnold v Samuels* (1972) 3 SASR 585; *R v S (No 2)* (1992) 7 WAR 434; *McKenna v The Queen* (1992) 7 WAR 455; *Benns v Judd* (1992) 58 SASR 295; *R v Everett and Phillips* (1994) 72 A Crim R 422 (Tas CCA) and *Maney v White* [2007] TASSC 7. For further discussion, see Warner, n 13, [3.507]–[3.509]. Note also that the Tasmanian Government has formally acknowledged that ‘it is particularly inappropriate for young people to be detained in prison, unless there are exceptional circumstances. There is substantial evidence that the experience of prison is more likely to confirm young people into a criminal career than to deter or rehabilitate them’: Tasmanian Government, *Corrective Services and the Response to Crime in Tasmania*, Policy Paper, Hobart (1992).

<sup>43</sup> *A-G (Tas) v Blackler* (2001) 121 A Crim R 465.

<sup>44</sup> *ibid*, [15]. See also *MJD v The Queen* [2000] TASSC 175.

\$24,000.<sup>45</sup> One of the brothers had incurred drug debts which he had no means of paying and was scared of his creditors, so he enlisted his brothers' assistance to steal enough to repay the debts. He vowed that he had then intended to stop stealing and he had ceased using drugs. Justice Blow imposed wholly suspended sentences on two of the brothers, including the drug-addicted instigator, while the third received a community service order, stating that:

I have to balance the need for deterrent penalties against the public interest in reforming these young offenders. Imprisonment would be likely to expose them to corrupting influences, and defeat the very purpose for which punishment is imposed. I think it will be helpful for them to keep their jobs. I have therefore decided to impose a combination of community service orders and suspended sentences.

Youth was cited as a consideration in suspending a sentence in whole or part in 59 cases.<sup>46</sup> As discussed in Chapter 4,<sup>47</sup> offenders aged 18-24 were disproportionately likely to receive a wholly suspended sentence, accounting for 34% of sentences imposed on such offenders, compared with 29% overall, while offenders aged under 18 were slightly more likely than average to receive a wholly or partly suspended sentence.

Prima facie, suspended sentences may not be an ideal sentencing option for young offenders, because they offer them no support during the sentence and sometimes lengthy operational period, thereby exposing them to a high risk of failure.<sup>48</sup> In jurisdictions where there is a presumption of activation on breach, this may mean that they end up prematurely in an adult prison.<sup>49</sup> Even if any subsequent offending takes place after the expiration of the operational period, suspended sentences may pose the same problems for young offenders as for first offenders, namely that they will be regarded as having failed to respond to more lenient dispositions, for whom immediate imprisonment may therefore be the next logical progression.<sup>50</sup> On the

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<sup>45</sup> *Matthew Bresnehan, Andrew Bresnehan and Robert Mundy* (COPS, Blow J, 15 August 2002). The main offender, Matthew Bresnehan, was subsequently dealt with for a further 66 property offences, for which he received a 20 month unsuspended sentence: *Matthew Bresnehan* (COPS, Slicer J, 28 June 2004).

<sup>46</sup> These data support the view above that there is a progressive loss of leniency for youth, rather than a sharp cut-off at 21: 47 of the 59 offenders were aged 21 or under, seven offenders were aged 22 and four aged 23. There was also one offender whose age was not mentioned but the sentence was suspended 'because firstly you are still comparatively a young man': *Nathan Smith* (COPS, Cox CJ, 22 March 2004).

<sup>47</sup> See [4.3.6.3].

<sup>48</sup> Note however the finding in that offenders aged 24 and under were more likely than average to be under the supervision of a probation officer as a condition of or in combination with their suspended sentence: [4.3.5.1].

<sup>49</sup> Arie Freiberg, *Pathways to Justice: Sentencing Review*, Department of Justice, Melbourne (2002), 124. For discussion of the relevance of age to reconviction and breach rates, see [6.4.3.4] and [7.5.4.3] respectively. For further discussion of breaches, including the TLRI's proposal to introduce a statutory presumption of activation on breach, see Chapter 7.

<sup>50</sup> It has been noted that suspended sentences put young people at risk of entering the *adult* correctional system, as there is a presumption in Victoria that on breach the young person must serve the sentence in an adult gaol: Sentencing Advisory Council, *Suspended Sentences: Interim Report*, Melbourne (2005) (SAC Interim Report), [5.45]-[5.55]. In Part 1 of its Final Report, it recommended that where the court is dealing with a young offender for breach, it be permitted to order the offender

other hand, my data in Chapter 6 suggest that offenders aged 18-24 at the time of sentence performed much better on wholly or partly suspended sentences than on unsuspended sentences or, more surprisingly, non-custodial orders.<sup>51</sup> These findings may therefore suggest that suspended sentences are an appropriate sentencing disposition for young offenders, a finding which conforms with the judicial sentiment expressed in Chapter 3.

#### 5.3.1.4 Old age

Old age may be considered a relevant factor in imposing sentence, as a sentencing judge ‘cannot overlook the fact that each year of the sentence represents a substantial proportion of the period of life which is left to him’.<sup>52</sup> On the other hand, the offender’s advanced age cannot be a justification for the imposition of an unacceptably inappropriate sentence.<sup>53</sup> Old age certainly does not preclude a sentence of immediate imprisonment, with four out of the seven offenders in 2002-2004 aged 70 and over receiving unsuspended sentences.

There were six cases where the judge stated that he was imposing a suspended sentence in consideration of the offender’s old age,<sup>54</sup> although in five of these cases, the offender also suffered from health problems, and it is therefore difficult to determine whether it was in fact poor health – itself possibly a result of age – which ultimately made the judge decide to suspend the sentence. In *Walker*,<sup>55</sup> the 86-year-old offender was convicted of fraud against the Commonwealth after she had illegally obtained the old age pension over a 25 year period. Blow J took into account life expectancy for a woman of the offender’s age and sentenced her to twelve months imprisonment, suspended after two months. He commented, ‘[i]f she were 30 years younger, I would consider sentencing her to at least four years’ imprisonment, with a requirement that she serve at least two years before being paroled or released.’ Somewhat surprisingly, when 74-year-old AWC<sup>56</sup> received a wholly suspended sentence for indecent assault, Evans J did not refer to the offender’s age as a relevant factor in suspending the sentence.

#### 5.3.1.5 Drug/alcohol rehabilitation

As discussed in Chapter 1, a new drug treatment order was recently introduced for offenders sentenced in the Magistrates’ Court, although such orders are not available

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to serve the sentence in a youth training or residential centre: Sentencing Advisory Council, *Suspended Sentences: Final Report - Part 1*, Melbourne (2006) (SAC Final Report), Rec 11.

<sup>51</sup> See [6.4.3.4].

<sup>52</sup> *R v Hunter* (1984) 36 SASR 101, 103 (King CJ). See also *Cobiack v Liddy* (1969) 119 CLR 257 and *R v Wacyk* (1996) 66 SASR 530.

<sup>53</sup> *R v Bazley* (1993) 65 A Crim R 154 (Vic CCA).

<sup>54</sup> Offenders aged 55 and over were however the group least likely to receive a wholly suspended sentence: see [4.3.6.3] and Figure 4.18.

<sup>55</sup> *Nola Walker* (COPS, Blow J, 8 August 2003). Cf *R v Townsend* [2007] NSWCCA 215, where the NSW Court of Criminal Appeal dismissed a Crown appeal against a wholly suspended sentence imposed on an 84-year-old woman in poor health who had defrauded the Commonwealth over 30 years.

<sup>56</sup> AWC (COPS, Evans J, 10 December 2002).

where the court would otherwise have suspended the sentence in whole or part.<sup>57</sup> The Court Mandated Diversion for drug offenders pilot introduced in mid-2007 also enables magistrates to make drug treatment a condition of a suspended sentence.<sup>58</sup> If these options prove ‘promising’, it is suggested that similar powers be granted to the Supreme Court.<sup>59</sup>

The discussion in Chapter 3 revealed a certain judicial ambivalence about the desirability of imposing a suspended sentence on an offender with substance abuse issues.<sup>60</sup> There is considerable case law to suggest that addiction to drugs or alcohol will not generally constitute a factor in mitigation.<sup>61</sup> As King CJ held in *Spiero*,<sup>62</sup>

One feels sympathy for a person who has become entangled in drug addiction, but the courts cannot treat addiction as an excuse, or even a mitigating factor, in relation to serious crime. Those who are addicted to drugs must understand that if they allow their addiction to lead them into serious crime, they must expect to receive the same severe punishment as would be received by others.

Wright J similarly held in *Harland-White*<sup>63</sup> that the offender’s drug dependency went ‘some way towards explaining his conduct, but it is by no means an excuse for what he did. Drug dependency is responsible for a vast amount of dishonest crime these days. To seek to excuse criminal conduct because of such a condition is facile nonsense.’

This position is however not universally accepted. As Simpson J acknowledged in *R v Henry*, drug addicts ‘do not come to their addiction from a social or environmental vacuum. This court should not close its eyes to the multifarious circumstances of disadvantage and deprivation that frequently precede and precipitate a descent into illegal drug use’.<sup>64</sup> Her Honour went on to say that the exercise of the sentencing decision ‘may call for an examination of the circumstances that led the offender to drug use, addiction and crime. All the circumstances that precipitate the use of drugs are relevant to the evaluation of moral culpability that is essential to the sentencing process’, suggesting that it would therefore be ‘too simplistic to lay down a principle

<sup>57</sup> See discussion in [1.2]. See also [3.4.3], (Q10) for discussion of Drug Courts.

<sup>58</sup> See Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008 (TLRI), 72.

<sup>59</sup> *ibid*, 73.

<sup>60</sup> See [3.4.3], (Q10).

<sup>61</sup> Note research indicating that 39% of all Tasmanian inmates reported that the main reason for committing the most serious offence for which they were currently incarcerated was drug-related: Paul Williams, Leesa Morris and Catherine Rushforth, *Drug Use Careers of Offenders (DUCO): Tasmania Sample (Confidential Report to Corrective Services Tasmania)*, Australian Institute of Criminology, Canberra (2003), 7. See also Raimondo Bruno, *Tasmanian Drug Trends 2005: Findings from the Illicit Drug Reporting System (IDRS)*, Technical Report No 245, National Drug and Alcohol Research Centre, Sydney (2006).

<sup>62</sup> *R v Spiero* (1979) 22 SASR 543, 549. For a summary of case law in Australia, see Greg Taylor, ‘Should Addiction to Drugs be a Mitigating Factor in Sentencing?’ (2002) 26 *Criminal Law Journal* 324. See also Edney and Bagaric, n 1, [7.4.6].

<sup>63</sup> *Harland-White v The Queen* (Unreported, Tas CCA, Underwood, Wright and Crawford JJ, 4 February 1998). See also *R v Henry* (1999) 46 NSWLR 346, [206] (Spiegelman CJ); *R v McKee* (2003) 138 A Crim R 88 and *R v Proom* (2003) 85 SASR 120.

<sup>64</sup> *R v Henry* (1999) 46 NSWLR 346, [337] (Simpson J).



that addiction either is, or is not, a mitigating circumstance in the sentencing of offenders convicted of drug related crime'.<sup>65</sup>

The ALRC has recently recommended that Federal sentencing legislation be amended to provide that the court take into account that an offender is voluntarily seeking treatment to address any physical or mental condition or illness that may have contributed to the commission of the offence.<sup>66</sup> This could be held to include any attempts to overcome substance abuse issues. In *Thomson*,<sup>67</sup> the Western Australian Court of Criminal Appeal imposed a suspended sentence in order to assist the offender's continued rehabilitation. The Victorian Court of Appeal observed in *Cotry*,<sup>68</sup> however, that a suspended sentence for offenders with substance abuse issues 'is not always the best option... Those who are drug addicted are always at risk of breaching their suspension orders when unsupervised, thus imperilling the purpose for which the order is made'. In *Proulx*,<sup>69</sup> the Canadian Supreme Court suggested that a drug addict may be a suitable candidate for a conditional sentence 'provided the judge is confident that there is a good chance of rehabilitation and that the level of supervision will be sufficient to ensure that the offender complies with the sentence'. In this context, it is important to note that there is currently also no information system in place in Tasmania that tracks a defendant after they have had an alcohol and drug assessment condition imposed by a court.<sup>70</sup> The comments of some judicial officers in Chapter 3 who sought more thorough monitoring<sup>71</sup> of orders should also be borne in mind.

There were 52 offenders who received a suspended sentence who had by the time of sentence undergone some form of drug and/or alcohol rehabilitation or were in the process of doing so,<sup>72</sup> although the evidence of rehabilitation was sometimes less than persuasive. *MacDonald*,<sup>73</sup> for example, was dealt with for aggravated burglary and stealing. He had been using drugs for a decade and had been admitted to a detoxification clinic on at least three previous occasions. He had also already received an eight month partly suspended sentence for property offences committed to support his drug habit and committed the subject offence during the operational

<sup>65</sup> *ibid*, [341]-[342] (Simpson J). See also *R v Fabian* (1992) 64 A Crim R 365 (Vic CCA); *Dunford v The Queen* (Unreported, Tas CCA, Cox, Underwood, Wright JJ, 17 March 1995), [10]; *R v Denman* (1995) 84 A Crim R 365 and *Harland-White v The Queen* (Unreported, Tas CCA, Underwood, Wright and Crawford JJ, 4 February 1998).

<sup>66</sup> ALRC, n 3, Rec 28-5(b). See further discussion below in the context of mental health issues.

<sup>67</sup> *Thomson v The Queen* [1998] WASCA 199

<sup>68</sup> *R v Cotry* [2002] VSCA 13, [9] (Winneke P, Charles and Brooking JJA agreeing). See also *Mobilis v The Queen* [2002] WASCA 130, [54] (McKechnie J, in dissent).

<sup>69</sup> *R v Proulx* [2000] 1 SCR 61, [72].

<sup>70</sup> Victor Stocevski, *The Establishment of a Drug Court Pilot in Tasmania*, Tasmania Law Reform Institute, Research Paper No 2 (2006), [4.3.10]. For discussion, see [3.4.9], (Q22).

<sup>71</sup> See [3.4.9].

<sup>72</sup> Not surprisingly, there was some overlap in these categories, as follows: 38 offenders were classified under drug rehabilitation, 6 under alcohol rehabilitation and a further 6 who received both. There were also 15 offenders who had received some other form of treatment, for example, anger management course or counselling, some in conjunction with drug/alcohol rehabilitation.

<sup>73</sup> *Cameron MacDonald* (COPS, Evans J, 29 October 2003).

period of that sentence. Shortly thereafter, he was again admitted to a detoxification clinic, before commencing a methadone program. Evans J may have found the offender's participation in the program compelling, because he suggested that '[w]ilst your progress since that time has been patchy, there is reason to hope that with the support of your parents it will continue.' He referred to the fact that this offence was committed in breach of a suspended sentence and imposed another eight month sentence, four months of which was suspended, 'in recognition of the progress you have made towards overcoming your abuse of drugs and with a view to providing impetus for those efforts'.

In some other cases, there was greater evidence in support of the offender's attempts at rehabilitation. In *Damien*,<sup>74</sup> for example, the offender pleaded guilty to arson for setting fire to his mother's house while under the influence of alcohol, cannabis and amphetamines. At the time of the offence, he been addicted to drugs for some 10 years and had been admitted to hospitals and clinics on numerous occasions. Underwood J imposed a wholly suspended sentence of 12 months, and noted:

During the 18 months that have passed since the commission of the crime you have made tremendous steps towards self-rehabilitation. You successfully undertook a drug rehabilitation course and I am told that you are not now using any drugs at all other than some prescribed medication. You undertook a TAFE social work course and subsequently have organised a men's group to help others who have similar past experiences to yourself.

In such cases, the ability of the court to suspend sentence presents a key incentive to offenders to make genuine efforts to deal with their drug addiction, but it may be desirable to link supervision and/or participation in a drug rehabilitation program more frequently with suspension of the sentence. To this end, the ALRC recently recommended that when a court imposes a suspended sentence, it should have broad discretion to order that offender to undertake a rehabilitation program.<sup>75</sup> It seems somewhat naïve to assume that an offender who is trying to overcome many years of dependency on drugs and/or alcohol will readily be able to do so just because they

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<sup>74</sup> *Michael Damien* (COPS, Underwood J, 4 April 2003).

<sup>75</sup> ALRC, n 3, Rec 7-10(a). Cf *R v Murphy* [2006] NSWCCA 417, where the NSW Court of Criminal Appeal rejected the submission that 'in the light of her background of drug abuse and the fact that she was continuing to use drugs at the time of sentence, her entry into a residential rehabilitation program should have been made a condition of the bond, rather than simply the subject of a recommendation. As he put it, it was unreasonable to put her back into the community and expect her to cope as matters then stood': [25]. Note also the position that requiring an offender subject to a conditional release order to undergo drug treatment may be inconsistent with the offender's release: *R v Jones* [1984] WAR 175, 180. For early discussion on consent issues relating to such treatment, see eg Richard Fox, 'Compulsion of Voluntary Treatment' (1992) 16 *Criminal Law Journal* 37, 44-46. It would seem that such considerations have been effectively subsumed in the Drug Court literature: see Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8; Arie Freiberg, 'Problem-oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196; Maria Borzycki, *Interventions for Prisoners: Returning to the Community*, Australian Institute of Criminology, Canberra (2005), 31-2 and Arthur Caplan, 'Ethical Issues Surrounding Forced, Mandated, or Coerced Treatment' (2006) 31 *Journal of Substance Abuse Treatment* 117.

have a suspended sentence hanging over their head.<sup>76</sup> Accordingly, there may be a need to have broader use of treatment, whether as a condition or in combination with the suspended sentence. The need for adequate supervision and treatment is especially acute in the context of offenders with dual diagnosis, who may require a variety of treatment and rehabilitation programs,<sup>77</sup> as was recognised recently in submissions to the SAC.<sup>78</sup> It is therefore worth bearing in mind the following comments in the Queensland case of *Basawa*.<sup>79</sup>

A suspended sentence will not provide this applicant with any supervision for his psychiatric illness and his drug abuse when he is released into the community, something which is in both the applicant's and the community's interest. To release the applicant with his myriad of complex problems into the community without supervision is to invite disaster, not just for him but also for the community.

### 5.3.1.6 Mental health issues<sup>80</sup>

It is well-accepted that mentally ill and intellectually disabled people are overrepresented within the Australian criminal justice system.<sup>81</sup> Where there is evidence that the offender was mentally disordered at the time of the offence, this is relevant to sentence, so long as there is no inconsistency with an unsuccessful defence of insanity or a guilty plea.<sup>82</sup> In some instances, the offender's mental condition may justify the imposition of a longer sentence in order to satisfy the offender's need for treatment or the protection of society.<sup>83</sup> Generally, however, it will be considered a factor in mitigation, because general deterrence usually plays a

<sup>76</sup> It is relevant to note for offenders on an unsuspended or partly suspended sentence that the Attorney General recently reported on the expansion of drug and alcohol programs at Risdon Prison: TLRI, n 58, 13.

<sup>77</sup> ALRC, n 3, [28.43] and Rec 28-4(c). For discussion of the prevalence of dual diagnosis in the criminal justice system, see Maree Teesson and Lucy Byrnes (eds), *National Drug Strategy and National Mental Health Strategy: National Comorbidity Project*, National Drug and Alcohol Research Centre, Canberra (2001).

<sup>78</sup> SAC Interim Report, n 50, [2.16].

<sup>79</sup> *R v Basawa* [2001] QCA 222 (McMurdo P, Thomas JA and Atkinson J agreeing).

<sup>80</sup> For discussion of sentencers' views on the appropriateness of suspended sentences for offenders with mental health issues, see [3.4.3], (Q10) and note the specialised mental health list currently being piloted in the Magistrates' Court, which aims to 'provide an opportunity for eligible individuals to voluntarily address their mental health and/or disability needs associated with offending behaviour': Tasmanian Magistrates' Court, *Mental Health Diversion List - Procedural Manual*, Hobart (April 2007), 3.

<sup>81</sup> ALRC, n 3, [28.1]. See also James Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice, No 334, Australian Institute of Criminology, Canberra (2007). For UK data on the mental health of prisoners compared with the general population, see *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison*, Esmeé Fairbairn Foundation, London (2004), Table 4. Whereas 0% of the general female population suffered from three or more mental disorders, 62% of female prisoners did so.

<sup>82</sup> Warner, n 13, [3.515]. See also Edney and Bagaric, n 1, [7.4.2].

<sup>83</sup> This will always be subject to the principle of proportionality: see *Channon v The Queen* (1978) 20 ALR 1; *Veen v The Queen* (1979) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465.

lesser role in such circumstances, as the offender may not be considered an appropriate medium for making an example to others.<sup>84</sup>

As discussed above, the ALRC recently recommended that voluntary treatment undertaken by an offender ‘to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence’ should be regarded as a relevant factor to be considered in sentencing.<sup>85</sup> In particular, it was suggested that if a person ‘is receiving and responding to a program or treatment it may be that the period of time required for rehabilitation is lessened, justifying a shorter sentence or *less severe sentencing option*.’<sup>86</sup> Even where there has not been any past rehabilitation, however, Warner observes that ‘[t]he chance of rehabilitation by psychiatric treatment may provide grounds for wholly or partly suspending the sentence’,<sup>87</sup> citing *inter alia* the case of *Hurd*,<sup>88</sup> where Cox J found that he was ‘not persuaded that a total sentence of two years’ imprisonment, half of which was suspended, sufficiently recognised the diminished responsibility of the [offender]’.

As discussed in Chapter 3,<sup>89</sup> some judicial officers appeared reluctant to impose a suspended sentence on an offender with mental health problems, while others saw such sentences as a useful tool in such cases. Mental health problems were mentioned as a relevant factor for 35 offenders who received a suspended sentence in 2002-2004, including where the offender suffered from schizophrenia, depression or suicidal tendencies. There were a further 10 suspended sentences where the offender suffered from intellectual disability, brain damage or low intelligence, the principles for which are similar to those governing mental disorder.<sup>90</sup> Imposition of a suspended sentence in such cases can provide a valuable means of ensuring that a very vulnerable sector of the community are not further disadvantaged and, where additional conditions are imposed, can allow scope for treatment. It is arguable, however, that such treatment could and should be made available in the absence of a

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<sup>84</sup> See eg *Roadley v The Queen* (1990) 51 A Crim R 336, 343 (Vic CCA) and *Parker v Gleeson* (Unreported, Tas SC, Underwood J, 30 August 1991).

<sup>85</sup> ALRC, n 3, Rec 28-5(b) and Ch 28. See also Susan Hayes, ‘Sentencing of People with Mental Disorders’ (2005) 96 *Reform* 24 and Jacobson and Hough, n 21, 23. For discussion in relation to conditional sentences in Canada, see Julian Roberts and Simon Verdun-Jones, ‘Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in Knoblach’ (2002) 39(4) *Alberta Law Review* 788.

<sup>86</sup> ALRC, n 3, [28.54]. Emphasis added.

<sup>87</sup> Warner, n 13, [3.516].

<sup>88</sup> *Hurd v The Queen* [1988] Tas R 126, 129. See also *R v Chandra* [2003] SASC 319, where DeBelle J in dissent suggested that an offender’s psychological or medical condition which would render imprisonment a greater hardship to him than to another person is a relevant consideration in determining the length of a term of imprisonment *and whether it should be suspended*: [50]. Emphasis added.

<sup>89</sup> See [3.4.3], (Q10).

<sup>90</sup> See *R v Koeppen* (Unreported, Tas CCA, Green CJ, Neasey and Cox JJ, 3 December 1982) and *Devine v The Queen* (1992) 2 Tas R 167. See also *M v Hibble* [2003] TASSC 13, [12]. Ironically, in the case of *Arlo Walsh* (COPS, Underwood J, 12 May 2004), the fact that the offender appeared to be *intelligent* was taken into consideration in deciding to suspend the sentence.

suspended sentence. In the case of *Rawlings*,<sup>91</sup> for example, the offender pleaded guilty to demanding property with menaces, injury to property and unlawfully setting fire to property, having previously committed similar offences. She had had a troubled life and appeared to be suffering from depression following the birth of unplanned triplets, who had since been removed from her care. Slicer J stated:

The criminal law is a cumbersome vehicle for the disposition of a case such as this. The crimes were serious but immediate further imprisonment is not appropriate. Ms Rawlings has served 49 days in custody for these crimes and, as best as I am able, I will meet the competing principles of sentencing by imposing a suspended term of imprisonment of 6 months, but provide conditions which will both afford supervision and permit access to State resources for treatment.

Justice Slicer imposed a number of conditions on Rawlings, including supervision by a probation officer, attendance at educational programs as directed by the court or probation officer, and drug, alcohol, medical, psychological and/or psychiatric testing and treatment, as directed by a probation officer. These conditions represent a constructive attempt to assist the offender in refraining from re-offending, however it could be argued that it would have been more appropriate to impose them as conditions of a probation order, rather than subjecting the offender to a suspended sentence and thereby exposing her to the risk of imprisonment upon breach, especially given that she had already spent seven weeks in custody.<sup>92</sup>

The sentence imposed in the case of *Baker*<sup>93</sup> was even more far-reaching, comprising a four month sentence, wholly suspended with treatment conditions similar to those imposed on Rawlings, and in addition, an assessment order, a supervision order and a continuing care order.<sup>94</sup> Once again, it is debatable whether her offence, namely one count of making a false threat of danger, merited a sentence of imprisonment in the first place, with 14 of the 16 such cases between 1978 and 2000 resulting in a non-custodial order.<sup>95</sup>

It is far from clear that mentally ill offenders are capable of comprehending such complex orders. At the same time, there are significant practical difficulties in ensuring that sentencers are able to craft meaningful and hopefully effective treatment regimes which don't potentially expose offenders to prison.<sup>96</sup> While there should be scope for individualising treatment, judges should be careful not to overload any offender, particularly a mentally disordered one, with an array of orders which may merely make breach an inevitable consequence. In this context, it is also relevant to note the submission to the SAC by the Victorian Mental Health Legal

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<sup>91</sup> *Kay Rawlings* (COPS, Slicer J, 4 May 2004).

<sup>92</sup> Although the Slicer J referred to earlier convictions for assault, disorderly conduct, injury to property and stealing, these offences appear to have been dealt with in the Magistrates' Court and it is therefore not possible to ascertain what sentences she received for her previous offending.

<sup>93</sup> *Amanda Baker* (COPS, Slicer J, 30 April 2004).

<sup>94</sup> See *Sentencing Act 1997* (Tas), ss 72-77A for the power to make such orders.

<sup>95</sup> Warner, n 13, [13.211].

<sup>96</sup> See [3.4.3], (Q10), where several sentencers raised this issue.

Centre that for those with a mental illness, ‘the prospect of likely imprisonment on breach may be more likely to precipitate breach than deter it’.<sup>97</sup>

### **Gambling addiction**<sup>98</sup>

The *Laws of Australia* considers gambling addiction to be a mental illness relevant to sentencing, though not of great weight.<sup>99</sup> This was certainly the attitude of Underwood J in *Garnsey v Stamford*,<sup>100</sup> when he stated that ‘the applicant’s addiction to gambling has very little weight as a circumstance of mitigation’. On the other hand, Taylor argues that problem gambling should be regarded as a mitigating factor, since gambling is ‘a legal product, promoted in some cases by the state and certainly licensed by it in a way that illegal drugs are not’,<sup>101</sup> and furthermore, that gamblers are rarely motivated by greed. In *Barandrecht v Ranford*, Justice McKechnie substituted a suspended sentence for an immediate term of imprisonment, stating that deterrent sentences are ‘more difficult to justify when the behaviour is compulsively addictive. It is better that the causes of the addiction be addressed’.<sup>102</sup>

There were three male and three female offenders in 2002-2004<sup>103</sup> who received suspended sentences after committing various property offences as a result of addiction to gambling.<sup>104</sup> In only one of the suspended sentence cases was treatment

<sup>97</sup> SAC Interim Report, n 50, [2.45]. By way of analogy, a NSW study found that there were almost twice as many prisoners with intellectual disabilities in prison for breach of parole conditions, compared with the general prisoner population: Jim Simpson and Linda Rogers, *Intellectual Disability and Criminal Law*, Hot Topics - Issue 39, Legal Information Access Centre, Sydney (2002). It follows that it is essential that offenders with such disabilities or mental health issues properly understand and are able to meet the conditions imposed upon them, whether as part of parole or a suspended sentence.

<sup>98</sup> For discussion of sentencers’ views on the appropriateness of suspended sentences for offenders with a gambling addiction, see [3.4.3], (Q10).

<sup>99</sup> *Laws of Australia*, n 13, 12.2, [117].

<sup>100</sup> *Garnsey v Stamford* (2002) 131 A Crim R 427, 430. See also *R v Machtas* (1992) 62 A Crim R 179 (NSWCCA); *Carreras v The Queen* (1992) 60 A Crim R 402 (WA CCA); *R v Martin* (1994) 119 FLR 220; *Police v John* (1995) 79 A Crim R 510; *R v Petrovic* [1998] VSCA 95; *R v Molesworth* [1999] NSWCCA 43; *R v Foley* [2001] ACTSC 109; *R v Chapman* [2001] NSWCCA 457; *DPP (Vic) v Raddino* (2002) 128 A Crim R 437; *DPP (Vic) v Truong* [2004] VSCA 172; *Nolan v Jarvis* [2006] TASSC 64; *Assi v The Queen* [2006] NSWCCA 257; *R v Huang* [2007] NSWCCA 259 and *Payne v The Queen* [2007] NTCCA 10, [35]. Cf *R v Novak* (1993) 69 A Crim R 145, 149.

<sup>101</sup> Greg Taylor, ‘Is Addiction Gambling Relevant in Sentencing?’ (2004) 28 *Criminal Law Journal* 141, 153 and 159. For discussion, see Yuka Sakurai and Russell Smith, *Gambling as a Motivation for the Commission of Financial Crime*, Trends and Issues in Crime and Criminal Justice, No 256, Australian Institute of Criminology, Canberra (2003); ALRC, n 3, [29.107]-[29.109] and Edney and Bagaric, n 1, [7.4.7].

<sup>102</sup> *Barandrecht v Ranford* [2001] WASCA 202, [17].

<sup>103</sup> Recent research found that women were more likely to cite gambling addiction as a motivation for committing serious fraud offences than men, although it is acknowledged that not all of the six offenders here were convicted of fraud offences. See Janice Goldstraw, Russell Smith and Yuka Sakurai, *Gender and Serious Fraud in Australia and New Zealand*, Trends and Issues in Crime and Criminal Justice, No 292, Australian Institute of Criminology, Canberra (2005), 3.

<sup>104</sup> It has been suggested that non-custodial sentences with conditions requiring offenders to undergo counselling and treatment for their addiction may be more effective than imposing custodial sentences: Sakurai and Smith, n 101, 5. See also PricewaterhouseCoopers, *Serious Fraud in Australia and New Zealand*, Research and Public Policy Series, No 48, Australian Institute of Criminology, Canberra (2003). In the present study, only two offenders received non-custodial orders and in both cases the offender had already sought help for their addiction.

also imposed, although two other offenders had voluntarily sought treatment to deal with their addiction,<sup>105</sup> while another had ceased gambling by the time of sentence.<sup>106</sup> In *Lew*,<sup>107</sup> Underwood J remarked that ‘the Court should do what it can to see that you overcome your addiction to gambling and become a law abiding citizen.’ He imposed an 18 month probation order in addition to a suspended sentence of the same duration, in order to ensure that the offender ‘gets necessary counselling for [his] addiction’. It may be appropriate to include such conditions as a matter of course in cases where there is no evidence that the offender has already taken measures to deal with their problem gambling.

#### 5.3.1.7 Physical health issues

Ill health or physical disability is a mitigating factor where the punishment is more burdensome to the offender or where there is a risk that imprisonment will have a grave effect on the offender’s health, with King CJ explaining in *Smith*<sup>108</sup> that:

The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have on the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health.

Chief Justice King expanded on this principle in *De Vroome*,<sup>109</sup> when he stated that an offender’s ‘psychological or medical condition which would render imprisonment a greater hardship to him than to another person, is a relevant consideration in determining the length of a term of imprisonment and *whether it should be suspended*’.

Health problems were cited as a factor in deciding to suspend the sentence for 30 offenders in 2002-2004, with women overrepresented in this category.<sup>110</sup> In the case of *JPK*,<sup>111</sup> the offender abetted her then partner in committing sexual assaults on her daughter, who was aged 10-12 at the time. The offender’s personal circumstances were compelling, including having herself been sexually abused in childhood. At the time of sentence, she had been recently diagnosed with multiple sclerosis, and Blow

<sup>105</sup> *Michelle Rodman* (COPS, Crawford J, 15 November 2002) and *Matthew Pigott* (COPS, Evans J, 7 May 2003).

<sup>106</sup> *Joachim Prehn* (COPS, Underwood J, 12 December 2002). On appeal, the Court held that the offender’s cessation of gambling was not a consideration that demanded a lesser penalty: *Prehn v The Queen* [2003] TASSC 55.

<sup>107</sup> *Vincent Lew* (COPS, Underwood J, 13 August 2002).

<sup>108</sup> *R v Smith* (1987) 44 SASR 587, 589, approved by the High Court in *Bailey v DPP (NSW)* (1988) 78 ALR 116.

<sup>109</sup> *R v De Vroome* (1989) 38 A Crim R 146, 147 (SA CCA). Emphasis added. In that case, however, the fact that the offender suffered from claustrophobia was deemed an inadequate reason to suspend the sentence. Similarly, in *R v La Rosa; ex parte A-G (Qld)* [2006] QCA 19, it was held on appeal that the offender’s bulimic condition did not preclude a sentence of actual imprisonment. See also *R v Chandra* [2003] SASC 319 and note the power in South Australia to suspend a sentence on the grounds of ill health, disability or frailty, discussed in [2.2.2.3].

<sup>110</sup> There were 11 female offenders in this category (37%), compared with 13% overall.

<sup>111</sup> *JPK* (COPS, Blow J, 28 May 2003). The principal offender was sent to prison but no details were provided as to the length of sentence received.

J noted that '[i]mprisonment, and the resulting stress, is likely either to exacerbate the condition or to interfere with its treatment.' He set a sentence of two years, adding that '[s]he must go to prison but, solely because of her multiple sclerosis, I will suspend part of her sentence [6 months] and impose the shortest possible non-parole period [9 months]'.

There were also several cases where the offender's 'poor health' was adverted to, without any details of such condition being provided,<sup>112</sup> including where this was the only factor mentioned as a possible reason for suspending the sentence.<sup>113</sup> Given the significant practical difference to an offender between a sentence of imprisonment served in a correctional facility and having merely the spectre of such sentence hanging over one's head, it is in my view desirable that more specific details be provided as to the health problems suffered by the offender and why this makes suspension of the sentence appropriate.

### 5.3.1.8 Adverse personal circumstances

Brennan J held in *Neal*<sup>114</sup> that 'emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence, though its mitigating effect can be outweighed by a countervailing factor'. In *S*,<sup>115</sup> Slicer J accepted that 'the emotional state of the offender is a factor to be considered as mitigatory', while in *Brown*,<sup>116</sup> the Court of Criminal Appeal regarded the offender's distress at his parents' recent death as diminishing his culpability such as to justify reducing the sentence for unlawfully setting fire to property from four years to one year, six months of which was to be suspended.

The adverse personal circumstances of 32 offenders were specifically taken into account in deciding to suspend a sentence, for example, where the offender had 'had a terrible life',<sup>117</sup> had been subjected to abuse in childhood,<sup>118</sup> or was in an abusive relationship at the time of the offence,<sup>119</sup> had been orphaned at a young age<sup>120</sup> or had recently experienced the death of a significant family member.<sup>121</sup> Although a life of adversity should not be regarded either by offenders or the community as a *carte blanche* for a life of crime,<sup>122</sup> it seems only just that offenders whose lives provide

<sup>112</sup> Eg *Maree Rigby* (COPS, Evans J, 11 December 2003) and *Gordon Clark* (COPS, Slicer J, 12 May 2004).

<sup>113</sup> Eg *Timothy Gay* (COPS, Slicer J, 16 April 2003).

<sup>114</sup> *Neal v The Queen* (1982) 149 CLR 305, 324. Reference omitted. See more recently *R v AWF* (2000) 2 VR 1 and *DPP (Vic) v Duong* [2006] VSCA 78.

<sup>115</sup> *R v S* (1991) Tas R 192.

<sup>116</sup> *R v Brown* (Unreported, Tas CCA, Nettlefold, Brettingham-Moore and Underwood JJ, 12 April 1985).

<sup>117</sup> *Suzanne Banks* (COPS, Blow J, 10 November 2003).

<sup>118</sup> Eg *JPK* (COPS, Blow J, 28 May 2003).

<sup>119</sup> Eg *Tammy Freeman* (COPS, Slicer J, 21 August 2002).

<sup>120</sup> *Nathan Smith* (COPS, Cox CJ, 22 March 2004).

<sup>121</sup> *Sarah Pearce* (COPS, Crawford J, 25 June 2003).

<sup>122</sup> For discussion of the so-called 'Rotten Social Background Defense' see William Heffernan and John Kleinig (eds), *From Social Justice to Criminal Justice*, Oxford University Press, New York (2000), especially William Heffernan, 'Social Justice/Criminal Justice', 47, 63-72; Stephen Morse,



them with little opportunity or incentive for law-abiding conduct receive some recognition of the difficult circumstances which they face.

There is also authority confirming that the courts may regard financial difficulties as mitigating, especially where these are not of the offender's own making.<sup>123</sup> There were nine offenders whose financial stress at the time of offending was taken into account. In the case of *Shorr*,<sup>124</sup> the offender attempted to make a fraudulent insurance claim for a fictitious property theft, although he did not pursue it further once the claim was rejected by the insurers. In imposing a wholly suspended sentence of three months, Evans J stated 'Serious as your conduct is, I do not consider that it warrants an immediately effective custodial sentence of imprisonment. Your fraudulent scheme was impetuously conceived at a time when you were under considerable financial pressure [due to the recent birth of your son]'. In some cases, no details were provided as to why the offender found him or herself in such dire financial straits and why they were unable to resort to more orthodox means for improving their financial situation. Once again, it would be desirable, for the purposes of clarity and consistency, for judges to expressly mention the evidence before them in this regard.

#### 5.3.1.9 Supportive relationships

Where an offender has what might be thought of as particularly good personal circumstances, this may also be taken into account in deciding to suspend a sentence. In particular, the Court appears ready to acknowledge the significance of supportive personal relationships, which are likely to help an offender desist from offending behaviour.<sup>125</sup>

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'Deprivation and Desert', 114, 153. See also Barbara Hudson, 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society*, Ashgate, Aldershot (2002) 562; Ashworth, n 21, [4.5] and Edney and Bagaric, n 1, [7.4.4].

<sup>123</sup> See *Grant v Davis* (Unreported, Tas SC, Green CJ, 15 May 1980) and *R v Tallon; ex parte A-G (Qld)* [1996] 1 Qd R 448. Note that Hart has suggested that 'for those who are below a minimum level of economic prosperity...we should incorporate as a further excusing condition the pressure of gross forms of economic necessity': H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford (1968), 51.

<sup>124</sup> *Gerhard Schorr* (COPS, Evans J, 23 April 2004). See also *Emma Pearce* (COPS, Evans J, 16 September 2003), where the offender also sought to provide for her as yet unborn child by stealing \$7,500 from the cash register she worked on at a takeaway restaurant. She received a wholly suspended sentence in part because of her youth and lack of prior record.

<sup>125</sup> For a summary of the pro-social effects of marriage, especially for men, see Andrea Leverentz, 'The Love of a Good Man? Romantic Relationships as a Source of Support or Hindrance for Female Ex-Offenders' (2006) 43 *Journal of Research in Crime and Delinquency* 459. See also John Laub, Daniel Nagin and Robert Sampson, 'Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process' (1998) 63 *American Sociological Review* 225; Shadd Maruna, *Making Good: How Ex-convicts Reform and Rebuild Their Lives*, American Psychological Association, Washington, DC (2001); Terry Rawnsley, *Dynamics in Repeat Imprisonment: Utilising Prison Census Data*, Australian Bureau of Statistics (2003), 17 and Borzycki, n 76, Appendix A, Table A5. Cf Chris May, *Explaining Reconviction Following a Community Sentence: The Role of Social Factors*, Home Office Research Study 192, London (1999), where reconviction rates for single offenders and those with partners were found to be 'virtually identical': ix. For discussion of the benefits of supportive parental relationships, see Shayne Jones, Elizabeth Cauffman and Alex Piquero, 'The Influence of

In 2002-2004, there were 31 offenders where some form of significant support in their lives appeared to be a reason for suspension. Although this was generally either a stable intimate relationship (13 cases), or supportive family (18 cases), a stable domestic environment generally may also provide grounds for suspension. In [REDACTED]<sup>126</sup> one of the factors Slicer J had regard to in imposing a suspended sentence for trafficking in a narcotic substance was the fact that the offender was now living in Melbourne with two lawyers whose son was of the same age as the offender and attended the same university. It was said that the couple were 'well experienced in dealing with young adults and [were] providing appropriate guidance and supervision.'

### 5.3.1.10 Risk of re-offending

The low likelihood of the offender re-offending was considered by Kirby J in *Dinsdale*<sup>127</sup> to be relevant to the decision whether to suspend. Cox J's position in *Causby* that 'a defendant does not qualify for a suspended sentence merely by persuading the court that the likelihood of repetition is slight or non-existent'<sup>128</sup> should, however, still be borne in mind. There were 20 cases in 2002-2004, 11 of which involved first offenders, in which the sentencing judge made an assessment that the offender was at low risk of re-offending in deciding to suspend. On the other hand, an assessment that there is a high risk of re-offending does not appear to preclude at least partly suspending a sentence, as there were two cases where a partly suspended sentence was imposed following an assessment that the offender was at risk of re-offending. There was also one case where such an offender received a wholly suspended sentence, but this was replaced with an unsuspended sentence following a successful Crown appeal.<sup>129</sup>

## 5.3.2 Factors relating to the offence

### 5.3.2.1 Motive

Although motive is irrelevant to criminal responsibility, except on an evidentiary basis, it may be relevant to penalty.<sup>130</sup> There is general authority in Tasmania to the

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Parental Support Among Incarcerated Adolescent Offenders' (2007) 34 *Criminal Justice and Behavior* 229.

<sup>126</sup> [REDACTED] (COPS, Slicer J, 9 July 2002). The Crown appealed unsuccessfully against the sentence: *A-G (Tas) v Blackler* (2001) 121 A Crim R 465. See [7.6] for discussion of the breach proceedings activating the sentence.

<sup>127</sup> *Dinsdale*, n 6, [88] (Kirby J). See also *Fardon v A-G (Qld)* (2004) 223 CLR 575, [124]-[126] (Kirby J). For discussion of the issues surrounding predicting the risk of re-offending, see eg James Wilson, 'Dealing with the High-Rate Offender' (1983) 72 *Public Interest* 52; Michael Tonry, *Sentencing Matters*, Oxford University Press, New York (1996), 139; Arie Freiberg, *Sentencing Review: Discussion Paper*, Department of Justice, Melbourne (2001), 44; Gemma Harper et al, 'Factors Associated with Offending' in Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291, London (2004) 17; ALRC, n 3, [4.16] and Edney and Bagaric, n 1, [3.2.2.2].

<sup>128</sup> *R v Causby* [1984] Tas R 54, 67. Cf *R v Meers and Moles* (1998) 101 A Crim R 329. See also *M v Hibble* [2003] TASSC 13 where the relevance of the risk of reoffending on the length of operational period was considered.

<sup>129</sup> See *Timothy Knight* (COPS, Slicer J, 13 June 2003) and *A-G (Tas) v Knight* [2003] TASSC 77.

<sup>130</sup> *Criminal Code Act 1924* (Tas), s 13(4). For discussion, see Warner, n 13, [3.410].

effect that provocation or a belief in facts which could constitute provocation can be a circumstance of mitigation,<sup>131</sup> and it was suggested in the South Australian case of *Faulds v Police*<sup>132</sup> that provocation ‘may be taken into account in determining whether a sentence should be suspended’.

There were 13 cases in 2002-2004 where the judge gave as a reason for imposing a wholly suspended sentence that the offender had some kind of motive for the offence which lessened culpability. In *Halliday*,<sup>133</sup> the offender was convicted of attempting to pervert the course of justice. Her son had been in a violent argument with his former partner. He sought to minimise his role in assaulting her by compelling her to sign a statement to the effect that she alone was responsible for her injuries. The offender wrote out the statement and witnessed the victim’s signature. Cox CJ suspended the sentence partly due to the fact that the offender ‘acted out of misguided loyalty to [her] son’.

In the case of *Godfrey*,<sup>134</sup> the offender pleaded guilty to assisting his 88-year-old mother commit suicide. His mother had been a long-time euthanasia advocate and was by the time of her death very ill and in chronic pain. Underwood J found that the offender’s actions were done with the support of his family and gratitude of his mother and that the crime was ‘motivated solely by compassion and love. It was an act of last resort’. Justice Underwood imposed a wholly suspended sentence of 12 months, suggesting that public denunciation of the act was unlikely to be widespread, there was no need for personal deterrence and that ‘having regard to the paucity of like cases across this country and elsewhere, it is difficult to see that there is a need for a sentence of general deterrence although there is authority in other States that this is necessary’.<sup>135</sup>

<sup>131</sup> See eg *R v S* (1991) Tas R 192 and *R v Meers and Moles* (1998) 101 A Crim R 329, 330-331 (Cox CJ).

<sup>132</sup> *Faulds v Police* (2002) 132 A Crim R 230, [34] (Wicks J). See also David Foot, ‘The Use of Suspended Sentences’ (1993) 157 *Justice of the Peace* 565 in relation to provocation amounting to ‘exceptional circumstances’ justifying suspension and Hough, Jacobson and Millie, n 7, 19-20.

<sup>133</sup> *Nancy Halliday* (COPS, Cox CJ, 8 October 2002). See also *Hendricus DeKroon* (COPS, Evans J, 14 May 2004) and *Matthew Bresnehan, Andrew Bresnehan and Robert Mundy* (COPS, Blow J, 15 August 2002), discussed above.

<sup>134</sup> *John Godfrey* (COPS, Underwood J, 26 May 2004). For comment, see Andrew Darby, ‘Son Who Helped His Mother Die Was Driven by Love, Says Judge’, *Sydney Morning Herald* (Sydney), 27 May 2004, <http://www.smh.com.au/articles/2004/05/26/1085461836101.html>; Cox, Tim, ‘Euthanasia Advocate Given Suspended Sentence’, *PM*, ABC Radio, 26 May 2004, <http://www.abc.net.au/pm/content/2004/s1116644.htm>. See also *David Weiderman* (COPS, Slicer J, 4 December 1996) and *Catherine Pryor* (COPS, Hill AJ, 19 December 2005), where the offender, a nurse, pleaded guilty to assisting her father, a doctor, to commit suicide. Some months later she attempted to kill her terminally ill mother by injecting her with insulin. She received a two year wholly suspended sentence for both offences. An application to appeal against the second conviction was discontinued: Baker, Mark, ‘Appeal on Conviction Dropped’, *The Examiner* (Launceston), 11 February 2006, <http://northerntasmania.yourguide.com.au/search.asp?c=&sc=&dr=v2006&author=baker&q=appeal&anyorall=1&sf=0&o=0&t=news&a=results&s=Search>.

<sup>135</sup> There have in fact been a number of cases in recent years where a wholly suspended sentence has been imposed in response to an act of ‘mercy killing’ of a close friend or family member, where the offender was apparently acting with the blessing of the ‘victim’ and generally following a lengthy debilitating and/or incurable illness. See *R v Marden* [2000] VSC 558; *R v ANG* [2001] NSWSC 758; *R v Hood* (2002) 130 A Crim R 473 (Vic SC); *R v Maxwell* [2003] VSC 278; *R v Nicol* [2005]

### 5.3.2.2 Offences committed in company

It is axiomatic that where there are multiple offenders, the sentence each receives should reflect his or her degree of participation in the offence. As Neasey J observed in *Prestage*,<sup>136</sup> ‘where other things are equal persons concerned in the same crime should receive the same punishment, and that where other things are not equal a due discrimination should be made between them’.<sup>137</sup> Furthermore, the High Court held in *Postiglione*<sup>138</sup> that a proper comparison of co-offenders’ sentences requires consideration of all components of the sentence.

In *Joneseski*,<sup>139</sup> Wright and Crawford JJ held that the fact of suspension may be a basis for a legitimate sense of grievance, whereas in the South Australian case of *Huggett*, it was held that ‘whether there has been unjustified disparity between sentences, the fact that one offender has received a suspended sentence can, in the usual case, have little or no relevance to the issue’.<sup>140</sup> The Tasmanian Court of Criminal Appeal recently considered this issue in *Attorney-General (Tas) v Knight*,<sup>141</sup> where it was submitted that the parity principle required that the offender receive a ‘like sentence’ to his co-offender’s wholly suspended sentence. This proposition was rejected by the Court on the basis of the offender’s worse record and greater role in the offence.

There were 14 cases in 2002-2004 where the offender’s minor role was stated as a relevant factor in deciding to suspend the sentence; in all such cases, the sentence was wholly suspended. In *Walsh*,<sup>142</sup> for example, the offender received a two month sentence for his part in an attack between two rival gangs, while his co-offenders received unsuspended sentences of up to 20 months. There were a further 10 cases where parity was mentioned as a relevant factor in imposing a suspended sentence. In *Pursell*,<sup>143</sup> an aggravated burglary case, Evans J noted that the co-offender ‘did not

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NSWSC 547 and *DPP (Vic) v Karaca* [2007] VSC 190. For discussion of *Nicol*, see Michael Pelly, ‘Agony of a Man Who Killed the Love of His Life’, *Sydney Morning Herald* (Sydney), 21 February 2005, 1 and Natasha Wallace, ‘Suspended Jail Term for Man in Mercy Killing’, *Sydney Morning Herald* (Sydney), 27 May 2005, <http://www.smh.com.au/news/National/Suspended-jail-term-for-man-in-mercy-killing/2005/05/27/1117129871826.html>. See also Margaret Otlowski, ‘The Nancy Crick Case: Discussion’ (2002) 21(3) *Monash Bioethics Review* 10, 10-11; Margaret Otlowski, ‘Mercy Killing Cases in the Australian Criminal Justice System’ (1992) 17 *Criminal Law Journal* 10, 20-24 and SAC Interim Report, n 50, [2.52].

<sup>136</sup> *R v Prestage* [1979] Tas R 270, 272-273. See also *R v Tait* (1979) 24 ALR 473 and *Lowe v The Queen* (1984) 154 CLR 606. For discussion, see Warner, n 13, [3.801]; ALRC, n 3, [5.20].

<sup>137</sup> In Hogarth’s study of Canadian magistrates, the most important individual determining factor in sentencing was the degree of culpability of the offender: Hogarth, n 6, 280.

<sup>138</sup> *Postiglione v The Queen* (1997) 189 CLR 295.

<sup>139</sup> *Joneseski v The Queen* [1991] Tas R (NC) N32 (Tas CCA).

<sup>140</sup> *R v Huggett* [2005] SASC 236, [32] (Sulan J, Doyle CJ and Perry J agreeing). See also *R v Canino* [2002] NSWCCA 76 and *El-Kheir v The Queen* [2007] NSWCCA 280.

<sup>141</sup> *A-G (Tas) v Knight* [2003] TASSC 77, discussed in [5.3.1.10]. See also *Brinkman v Dix* (Unreported, Tas CCA, Cox CJ, Wright and Slicer JJ, 2 November 1998) and *Clark v The Queen* [2000] TASSC 161.

<sup>142</sup> *George Walsh* (COPS, Cox CJ, 16 October 2002). See also *Claire Blyton and Donna Cullen* (COPS, Evans J, 20 February 2004) and *Rebecca Smith* (COPS, Cox CJ, 25 February 2004).

<sup>143</sup> *Paul Pursell* (COPS, Evans J, 9 September 2002).

receive an immediate custodial sentence for his involvement in these offences, notwithstanding that his record of prior convictions is worse than yours'. Although Evans J felt the co-offender had been dealt with leniently, 'the consideration of parity, coupled with the steps you have taken to rehabilitate yourself since your commission of these offences, satisfy me that an immediate custodial sentence is not required'.

### 5.3.2.3 Consequences and impact on victim

Tasmania is the only jurisdiction in Australia not to expressly recognise the personal circumstances of the victim in its sentencing legislation,<sup>144</sup> although the Act does enable the court to receive a victim impact statement.<sup>145</sup> There is case law to the effect that the impact on the victim, both physically and psychologically, as well as any consequential suffering, will be considered relevant to sentence<sup>146</sup> and there is also some limited authority to suggest that the courts in Tasmania have been willing to give some weight to an attitude of forgiveness by the victim.<sup>147</sup> In *F*,<sup>148</sup> Slicer J acknowledged that '[a] child criminally touched does not necessarily seek a custodial sanction. A member of a family might desire the continuation of the family unit, rather than irretrievable fracture.' He imposed a partly suspended sentence for five

<sup>144</sup> Cf *Crimes Act 1914* (Cth), s 16A(2)(d); *Criminal Law (Sentencing) Act 1988* (SA), s 10(d); *Sentencing Act 1991* (Vic), s 5(2)(da); *Penalties and Sentences Act 1992* (Qld), s 9(2)(c); *Sentencing Act 1995* (WA), s 6(2)(b); *Sentencing Act 1995* (NT), s 106(b); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2) and *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(d). For details of the rights of victims of crime in each Australian jurisdiction, see Michael O'Connell, 'Victimology: An Introduction to the Notion of Criminal Victimisation' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice*, Australian Humanities Press, Unley (2004) 192, Table 8.2.

<sup>145</sup> *Sentencing Act 1997* (Tas), s 81A and see *Justice Rules 2003* (Tas), Pt 9A. The statement may give particulars of the injury, loss or damage suffered by the victim as a direct consequence of the offence and describe the effects on the victim of the commission of the offence.

<sup>146</sup> See Warner, n 13, [3.417]-[3.421] and SAC Interim Report, n 50, [2.10]. The ALRC recently recommended that 'the impact of the offence on any victim' be included in the proposed list of factors to be considered by the court pursuant to the *Crimes Act 1914* (Cth): ALRC, n 3, Rec 6-1V.

For further discussion of the use of victim impact statements and victim input in sentencing, see Edna Erez, 'Victim Participation in Sentencing: Rhetoric and Reality' (1990) 18 *Journal of Criminal Justice* 19; Andrew Ashworth, 'Victim Impact Statements and Sentencing' [1993] *Criminal Law Review* 498; Katie Long, 'Community Input at Sentencing: Victim's Right or Victim's Revenge?' (1995) 75 *Boston University Law Journal* 187; Alisdair Gillespie, 'Victims and Sentencing' (1998) 148 *New Law Journal* 1263; Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes' (1999) 39 *British Journal of Criminology* 216; Ian Edwards, 'Victim Participation in Sentencing: The Problems of Incoherence' (2001) 40 *Howard Journal of Criminal Justice* 39; Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 62; Joan Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73; Ashworth, n 21, [11.9.2] and ALRC, n 3, [14.3]-[14.45].

<sup>147</sup> As discussed in [1.5.2.1], research indicates that victims are no more punitive than the general public, but Roberts has expressed concern that allowing victims' views to determine whether an offender is allowed to serve a sentence at home would distort the principles of equity and proportionality: Roberts (2004), *ibid*, 169.

<sup>148</sup> *R v F* (1998) 8 Tas R 88, 97. See also *McGhee v The Queen (No 2)* (Unreported, Tas CCA, Green CJ, Wright, Zeeman JJ, 25 August 1994) and *R v Douglass* (2001) 34 MVR 35, where the offender's drunken driving rendered his wife a quadriplegic. The fact that she did not wish him to be imprisoned was a significant factor in the NSW Court of Criminal Appeal substituting a suspended sentence. Cf *R v O'Neill* [2006] QCA 383.

counts of indecent assault on the offender's daughters, noting that '[t]he ambivalence of the complainants is also relevant to the extent of the suspension. The sentence will evidence their regard for his conduct, whilst the suspension of part will reflect their compassion for a father once loved and respected before betrayal.'

There were seven cases in 2002-2004 where the wishes of the victim played a role in the judge deciding to suspend the sentence. In each case, the offender and victim were in some form of ongoing domestic relationship and the victim had reconciled with and forgiven the offender. In three cases, the offender and victim were in an intimate relationship,<sup>149</sup> and in two cases, the offender was the victim's son. In the case of *GWQ*,<sup>150</sup> the offender had indecently assaulted his granddaughter on one occasion. The victim was alleged to have no recollection of the event and her parents had reconciled with the offender. Cox CJ accordingly imposed a wholly suspended sentence for four months.

### 5.3.3 Response to the charges

#### 5.3.3.1 Plea of guilty

Although a sentence may not be increased because of a decision to plead not guilty, a guilty plea will generally be considered a mitigatory factor, albeit one of little weight where it results only from a bowing to the inevitable.<sup>151</sup> The High Court considered the issue in *Siganto*,<sup>152</sup> where the majority held that:

a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.

More recently, a majority of the High Court held in *Cameron*<sup>153</sup> that in order to reconcile the requirement that a person not be penalized for pleading not guilty with

<sup>149</sup> For discussion of the relevance of the victim's wishes in the context of domestic violence, see Kate Warner, 'Sentencing the Violent Spouse' (1996) 3 *Psychiatry, Psychology and Law* 107; Julia Davis, 'Domestic Violence and Sexual Abuse' (1998) 27 *University of Western Australia Law Review* 227; Kate Warner, 'Sentencing in Cases of Marital Rape' (2000) 20 *Legal Studies* 593; Julian Roberts and Kent Roach, 'Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis' (2005) 9 *Queen's Law Journal* 560, 576-7 and Kate Warner, 'Sexual Offending: Victim, Gender and Sentencing Dilemmas' in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice*, Butterworths, Sydney (2005) 233.

<sup>150</sup> *GWQ* (COPS, Cox CJ, 11 July 2002).

<sup>151</sup> *Murphy v The Queen* [2000] TASSC 169. See also *R v Shannon* (1979) 21 SASR 442; *R v Lyons* (1993) 69 A Crim R 307 (Tas CCA) and *Inkson v The Queen* (1996) 6 Tas R 1.

<sup>152</sup> *Siganto v The Queen* (1998) 194 CLR 656, 663-664 (Gleeson CJ, Gummow, Hayne and Callinan JJ). See also *R v Dowie* [1989] Tas R 167; *Inkson v The Queen* (1996) 6 Tas R 1 and *Harland-White v The Queen* (Unreported, Tas CCA, Underwood, Wright and Crawford JJ, 4 February 1998).

<sup>153</sup> *Cameron v The Queen* (2002) 209 CLR 339, [13]-[15] (Gaudron, Gummow and Callinan JJ); cf the approach taken in NSW as discussed in *R v Sharma* (2002) 54 NSWLR 300. Note also the NSW guideline judgment on guilty pleas: *R v Thomson and Houlton* (2000) 49 NSWLR 383. For the view that discounts for guilty pleas put an inappropriate burden on the accused and undermine proper sentencing principles, see Kathy Mack and Sharyn Roach Anleu, 'Sentencing Discount for a Guilty Plea: Time for New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 124 and David Field, 'Plead

the rule that a plea of guilty may be taken into account in mitigation, the rationale for any discount must be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a trial.

It is not required for the present discussion to resolve the issue of how much weight is to be given to guilty pleas and the appropriate means of acknowledging any such discount, but I accept that a plea is ‘without more, a matter going to the mitigation of penalty’.<sup>154</sup>

Kirby J declared in *Dinsdale*<sup>155</sup> that in deciding whether to suspend a sentence, it is necessary to look again at all the relevant matters, while the relevant legislation in Queensland which requires a court to take an offender’s guilty plea into account has been interpreted as including partly or wholly suspending the sentence.<sup>156</sup> The prospect that their custodial sentence may be suspended may induce some offenders to plead guilty, with the SAC querying whether the abolition of suspended sentences might cause a reduction in the number of guilty pleas.<sup>157</sup>

It is not surprising to find that offenders who pleaded guilty were dealt with more leniently than those who pleaded not guilty, although there was little difference in the use of non-custodial orders (14% vs 11%). Offenders who pleaded guilty were, however, much more likely to receive a wholly suspended sentence (31% vs 22%). The offender’s guilty plea was explicitly referred to as a relevant factor in the imposition of a suspended sentence in 34 cases, although 303 of the 351 suspended sentences handed down in fact followed a guilty plea. It would therefore seem that although a guilty plea is a relevant consideration in the sentencing disposition overall, mentioning it as an express factor relevant to the decision to suspend occurs somewhat arbitrarily. Indeed, it might almost be thought that express reference to this factor, especially when there is no other mitigating factor which would justify

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Guilty Early and Convincingly to Avoid Disappointment’ (2002) 14 *Bond Law Review* 251, 258. See also Edney and Bagaric, n 1, Ch 8.

<sup>154</sup> *Pavlic v The Queen* (1995) 5 Tas R 186, 192-193 (Slicer J). For further discussion, see ALRC, n 3, [6.164]-[6.166]; [11.15]-[11.56]; Recs 11-1 and 11-2.

<sup>155</sup> *Dinsdale*, n 6, [85] (Kirby J).

<sup>156</sup> *R v Timoti* [2003] QCA 96, interpreting section 13 of the *Penalties and Sentences Act 1992* (Qld), which requires a court sentencing an offender who has pleaded guilty to take that plea into account and states that the court *may* reduce the sentence that would have been imposed. It has been suggested in the Northern Territory that it may be appropriate to give effect to the value of a guilty plea by *partially* suspending a sentence: *Kelly v The Queen* (2000) 10 NTLR 39 and *Booth v The Queen* [2002] NTCCA 1.

In England, the Sentencing Guidelines Council has suggested that ‘application of the reduction principle may properly form the basis for imposing an alternative to an immediate custodial sentence: Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (2004), [http://www.sentencing-guidelines.gov.uk/docs/Guilty\\_plea\\_guideline.pdf](http://www.sentencing-guidelines.gov.uk/docs/Guilty_plea_guideline.pdf), [2.6].

<sup>157</sup> Sentencing Advisory Council, *Suspended Sentences: Discussion Paper*, Melbourne (2005), [8.27] and SAC Final Report, n 50, [4.49].

the imposition of a suspended sentence,<sup>158</sup> occurs when a judge is searching ‘for reason “in mercy”’ to suspend a term of imprisonment.

### 5.3.3.2 Remorse<sup>159</sup>

It has been suggested to be ‘beyond argument that contrition is a factor properly to be considered in determining what measure of clemency should be extended to an accused person’,<sup>160</sup> while Slicer J has suggested that remorse ‘is acceptance of and insight into conduct. Genuine remorse permits a form of reconciliation with self, victim, family and the community’.<sup>161</sup>

Although a plea of guilty is not essential as a demonstration of contrition or remorse,<sup>162</sup> Wright J observed in *Dowie*<sup>163</sup> that:

actions speak louder than words. Furthermore, it is not without relevance to consider that an offender’s regret is often born from self reproach following apprehension, rather than from genuine contrition for the crime itself. If, however, it is more comforting to justify mitigation on the basis of contrition and remorse I think such subjective attitudes of mind are more readily inferred from a plea of guilty than from protestations from the dock or the bar table.

The Supreme Court has previously considered the relevance of contrition in relation to suspended sentences, with Cox J suggesting in *Causby* that on one view, contrition is a factor which should be taken into account in determining the initial sentence rather than as a factor calling for clemency by way of suspension,<sup>164</sup> although he later clarified this position when he stated in *Meers and Moles*:<sup>165</sup>

the view that contrition and the prospect of non-repetition are factors to be taken into account in setting the initial sentence is simply one view. In my opinion it is still legitimate for the sentencer to treat these matters as factors relevant to the suspension

<sup>158</sup> See for example *Stephen Hall* (COPS, Evans J, 14 October 2003), where the offender’s guilty plea appeared to be the only factor in mitigation, as the judge did not accept his stated remorse for his actions.

<sup>159</sup> The terms ‘remorse’ and ‘contrition’ appear to be used interchangeably by Tasmanian judges and I accordingly do so too. For discussion of the differences between the terms, consider *R v Pereira* (1991) 57 A Crim R 46 (NSWCCA).

<sup>160</sup> *R v Gray* [1977] VR 225, 231 (McInerney and Crockett JJ). For discussion, see Andrew West, ‘The Relevance of an Apology in the Sentencing Process’ (1997) 18 *Queensland Lawyer* 80; Michael Proeve, David Smith and Diane Niblo, ‘Mitigation without Definition: Remorse in the Criminal Justice System’ (1999) 32 *Australian and New Zealand Journal of Criminology* 16 and Jacobson and Hough, n 21, 24. Cf Mirko Bagaric and Kumar Amarasekara, ‘Feeling Sorry?-Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing’ (2001) 40 *Howard Journal of Criminal Justice* 364 and Field, n 153, 264-7. See also Edney and Bagaric, n 1, [7.4.5], where it is argued that ‘remorse should henceforth be abandoned as a sentencing consideration unless demonstrable empirical data indicates that rehabilitation is an attainable sentencing objective’.

<sup>161</sup> *Murphy v The Queen* [2000] TASSC 169, [18].

<sup>162</sup> *R v Gray* [1977] VR 225, 231 (McInerney and Crockett JJ). See also *R v Lane* (1990) 48 A Crim R 161 (SA CCA).

<sup>163</sup> *R v Dowie* [1989] Tas R 167, 251. Cf *Paul v The Queen* (Unreported, Tas CCA, Neasey, Nettlefold and Cox JJ, 7 September 1988) and *Hryczyszyn v The Queen* [1976] Tas SR 10.

<sup>164</sup> *R v Causby* [1984] Tas R 54, 57 (Cox J).

<sup>165</sup> *R v Meers and Moles* (1998) 101 A Crim R 329, 332. This approach would seem to presage the decision in *Dinsdale*, n 6, that the discretion to suspend is not to be confined to the offender’s prospects of rehabilitation.



of a sentence in whole or in part and I dispute the proposition that the sentencer can only give them effect by way of a reduction of the initial sentence.

In a recent English survey of judges it was said to be ‘common for sentencers to refer to “remorse” or “contrition” as a factor that could tip them away from a custodial sentence, even if the offence in itself might otherwise merit custody’.<sup>166</sup> The offender’s demonstration of remorse or contrition was referred to by the judge in deciding to suspend in 34 cases in 2002-2004. In all but one of these cases, the offender had also pleaded guilty,<sup>167</sup> although the plea was referred to as a factor relevant to the decision to suspend in only six of those cases. In *Smith*,<sup>168</sup> Evans J observed that the offender was ‘23 years of age and has no prior convictions. This factor, *coupled with the remorse manifested by his plea of guilty*, persuades me that the sentence of imprisonment I am to impose should be wholly suspended.’

There was a somewhat clearer manifestation of contrition in the case of *Rainbird*,<sup>169</sup> who pleaded guilty to causing grievous bodily harm. The victim was his 96-year-old grandmother, with whom he often stayed overnight. On this occasion, he went to see her to say goodbye, as he was planning to move to Western Australia. They started arguing, apparently because she did not agree with his decision to move interstate, and he struck her forcefully several times. In sentencing the offender to a 12 month sentence, six months of which was suspended, Crawford J said that the offender ‘demonstrated considerable remorse when being interviewed and continues to do so...His violence was not premeditated and he is truly shocked by what he did.’ Similarly, in the case of *West*,<sup>170</sup> the offender was woken up in the middle of the night to feed his *de facto* partner’s baby. He reacted to the baby’s crying by throwing him across the room, causing him serious head injuries, from which he had fortunately since recovered. Cox CJ took into account a number of factors, including the offender’s youth, and in imposing a wholly suspended sentence of six months, noted that the offender was ‘immediately appalled by [his] behaviour’ and ‘when interviewed by police...clearly demonstrated [his] revulsion at what [he] had done and [his] remorse for it.’

In my view, it would be preferable, when the court suspends a sentence of imprisonment on the basis of this factor, for there to be some clear manifestation of true remorse or contrition, separate from a guilty plea. In some cases, a plea of guilty may mean nothing more than a recognition of inevitable conviction, for example,

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<sup>166</sup> Hough, Jacobson and Millie, n 7, 41. Tasmanian sentencers, by contrast, made little reference to the relevance of remorse: see [3.3].

<sup>167</sup> See *Grant Brakey* (COPS, Crawford J, 7 May 2003), where the offender pleaded guilty to one count and was found guilty by a jury of a further two counts, all of which related to assaults on the same person over two nights.

<sup>168</sup> *Ricky Smith* (COPS, Evans J, 30 October 2002). Emphasis added.

<sup>169</sup> *Barry Rainbird* (COPS, Crawford J, 27 April 2004).

<sup>170</sup> *Ben West* (COPS, Cox CJ, 17 February 2003). A Crown appeal against a suspended sentence imposed in almost identical circumstances was dismissed by the New South Wales Court of Criminal Appeal in *R v Remilton* [2001] NSWCCA 546.

where an offender has effectively been caught ‘red-handed’. Offenders in such situations might otherwise receive a double benefit for pleading guilty.<sup>171</sup>

### 5.3.3.3 Co-operation and informing

An offender’s co-operation with the authorities, especially volunteering confessions for offences of which the police would otherwise have been unaware,<sup>172</sup> and informing on co-offenders<sup>173</sup> is a significant mitigating factor. There are good public policy reasons for this, including recognition of the additional hardship informers may face<sup>174</sup> and the social utility of rewarding them for the information provided.<sup>175</sup> In *Stanley*,<sup>176</sup> however, Slicer J observed, that:

Ordinarily, the suspension of all or a portion of the sentence affords a sentencing tribunal power to ensure future compliance with conditions or events. But such is neither practicable nor morally defensible in a case where a person is to give evidence against a co-offender. The postponement or suspension of a sentence on condition until the assessment of the quality of evidence, is indefensible in any consideration of the sentence of a prisoner or the subsequent trial of a claimed co-offender.

The offender’s past assistance or intention to provide such assistance was referred to in 24 suspended sentence cases. In *Jones’* case,<sup>177</sup> where police conducted a search for stolen property at premises jointly occupied by the offender, unused needles and drug-related paraphernalia were found in the offender’s bedroom, at which time the offender volunteered the information that he had been involved in the sale of drugs. He later went to the police station and made full admissions. As Slicer J stated, the offender was not known to police and they did not have any suspicion that he was involved in any way in the drug culture. Accordingly, his conviction depended ‘solely on his volunteered information and would otherwise have been impossible to obtain.’ This factor, taken together with the fact that he was a young first offender, led Slicer J to wholly suspend his four month sentence.

<sup>171</sup> For discussion of the potential for double discounting, see ALRC, n 3, [11.55].

<sup>172</sup> See for example *Ryan v The Queen* (2001) 206 CLR 267. *Pavlic v The Queen* (1995) 5 Tas R 186 sets out the position in this respect in Tasmania. In many jurisdictions, there is also statutory recognition of the principle: see *Sentencing Act 1991* (Vic), s 5(2AB); *Penalties and Sentences Act 1992* (Qld), s 9(2); *Sentencing Act 1995* (NT), s 429A; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 23;. For discussion of the Commonwealth position under the *Crimes Act 1914* (Cth), ss 16A and 21E, see *Timothy Williams* (COPS, Evans J, 24 June 2004); *DPP (Cth) v AB* (2006) 94 SASR 316 and ALRC, n 3, [11.57]-[11.65]; and Recs 6-8(b); 11-3 and 11-4. In particular, the ALRC recommended that the legislation provide that a court may impose a less severe sentencing option when sentencing a Federal offender who undertakes to co-operate: Rec 11-4(a).

<sup>173</sup> See *Malvaso v The Queen* (1989) 168 CLR 227 and *R v Stanley* (1998) 7 Tas R 257.

<sup>174</sup> *R v Gallagher* (1991) 23 NSWLR 220; *York v The Queen* (2005) 225 CLR 466 and *R v BCC* [2006] NSWCCA 130.

<sup>175</sup> See Sir Guy Green, ‘The Concept of Uniformity in Sentencing’ (1996) 70 *Australian Law Journal* 112, 113; Warner, n 13, [3.609] and Edney and Bagaric, n 1, [7.4.9].

<sup>176</sup> *R v Stanley* (1998) 7 Tas R 257.

<sup>177</sup> *Nicholas Jones* (COPS, Slicer J, 14 May 2003).

#### 5.3.3.4 Restitution

Although there should be no suggestion that an offender may be able to buy his or her way out of punishment,<sup>178</sup> attempts to make restitution are a mitigatory factor at common law. It was accepted in *Attorney-General (Tas) v Saunders*<sup>179</sup> that ‘if the deficiency can be made good, particularly before the date of sentence, then the severity of punishment may be ameliorated’, while Warner and Gawlik recently suggested that ‘[u]ndoing the harm by making reparation to the victim could be said to be mitigating irrespective of motive and so could be relevant to the decision to suspend’.<sup>180</sup>

Attempts to repay stolen monies were mentioned as a factor relevant to the decision to suspend in nine cases in 2002-2004. In *Rodman*,<sup>181</sup> Crawford J weighed up whether the sentence to be imposed on a woman who had stolen almost \$16,000 from her employer should be wholly or only partly suspended. He remarked that:

In the end the scales have tipped in your favour because of the repayment of the money that has been made. That also caused me difficulty because one principle is that people should not be able to avoid imprisonment by repaying the loss they caused. On the other hand it is in the public interest that victims be repaid. However, the scales were so finely balanced in your case that having regard to repayment I am persuaded that all of the sentence should be suspended.

#### 5.3.3.5 Delay

A substantial delay between the commission of the offence and the time of sentence may be mitigating if such delay is not the offender’s fault.<sup>182</sup> In particular, where there has been intervening rehabilitation, less weight will need to be given to

<sup>178</sup> Ashworth regards reduction of a sentence to reflect voluntary reparation as ‘in blunt terms, middle-class mitigation’: Ashworth, n 21, [5.4.3].

<sup>179</sup> *A-G (Tas) v Saunders* [2000] TASSC 22, [7] (the Court). See also *Mickelberg, Mickelberg and Pozzi v The Queen* (1984) 13 A Crim R 365 (WA CCA) and *Phelan v The Queen* (1993) 66 A Crim R 446 (NSWCCA). In *DPP (Vic) v Adams* [2006] VSCA 149, the Victorian Court of Appeal overturned a 39 month sentence, 30 months of which were suspended, in order to allow the offender to make restitution.

<sup>180</sup> Kate Warner and Jenny Gawlik, ‘Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice’ (2003) 36 *Australian and New Zealand Journal of Criminology* 60, 70. Restitution orders may also be imposed as a separate order under *Sentencing Act 1997* (Tas), s 65.

Note the suggestion of the Tasmanian Catholic Justice and Peace Commission, Submission 21, Tasmania Law Reform Institute (ed), *Responses to the Sentencing Issues Paper No 2*, Hobart (2002) that a system of restorative justice be used in conjunction with suspended sentences, whereby the sentence could be suspended ‘if property is restored, damage restored or victim recompensed in some way’. Roberts and Roach have also called for greater use of reparative conditions for community-based sanctions, arguing that reparation ‘can serve as a tangible form of acknowledgement by the offender of responsibility for the offence and for the harm caused to the victim: Roberts and Roach, n 149, 596. Note also the findings of a recent English study that there was significantly less public support for custody when the offender had promised to make compensation to the victim: Julian Roberts and Mike Hough, ‘Sentencing Young Offenders: Public Opinion in England and Wales’ (2005) 5(3) *Criminal Justice* 211.

<sup>181</sup> *Michelle Rodman* (COPS, Crawford J, 15 November 2002). See also the case of *Troy Bloomfield* (COPS, Blow J, 6 August 2002), who ‘did the right thing’ and after participating in a burglary, mailed the victim’s passport and share certificates back to him and was caught as a result.

<sup>182</sup> See *Smith v The Queen* (1982) 7 A Crim R 437 (Vic CCA) and *Hawkins v The Queen* [2004] TASSC 55. Cf *R v Elias* [2007] VSCA 125. For comment, see Edney and Bagaric, n 1, [7.4.10]; see also discussion in relation to the ‘gap effect’ in [5.3.1.1].

personal deterrence.<sup>183</sup> Little weight will generally be given in cases of sustained child sexual assault, however, where delays in disclosure are all too common, and especially where the victim has not disclosed the offence out of fear.<sup>184</sup> In 2002-2004, there were six cases where delay was cited by the sentencing judge as a factor supporting suspension of sentence,<sup>185</sup> although such offenders were more likely to receive only partial suspension of their sentence. In *Crowley*,<sup>186</sup> Blow J suspended six months of a 30 month sentence on the offender, who had had a sexual relationship with his 15-year-old sister-in-law in the 1970s. He commented that:

The passing of many years between the commission of a crime and the imposition of sentence is not of itself a mitigating factor when, as is the case here, it would take great courage for the complainant to report the crime to the authorities. What is significant is that the prisoner has rehabilitated himself, and that he has now fallen from a position of high respect in his profession to one of shame and disgrace.

### 5.3.4 Effect of offence and sanction

#### 5.3.4.1 Hardship to offender

Hardship to the offender may be taken into account when considering the effect of the sanction,<sup>187</sup> with the High Court holding in *York*<sup>188</sup> that it was appropriate for a judicial officer to take into account the grave risk that an offender could be killed in prison. Two particularly prominent aspects of hardship are discussed below.

##### **Loss of employment**

Loss of employment as a result of the offence is also relevant and it has been suggested that it ‘may well tip the balance in favour of a non-custodial penalty or suspension of a custodial sentence’,<sup>189</sup> as was confirmed by Evans J in the recent case of *James v Turner*.<sup>190</sup> Suspending a prison sentence in such circumstances would seem to be unimpeachable, as there is evidence positively linking unemployment with criminal offending (and conversely, employment with a reduction in

<sup>183</sup> *Ponsford v Wynwood* [1999] TASSC 21.

<sup>184</sup> Eg *Abel v The Queen* (Unreported, Tas CCA, Cox, Wright and Crawford JJ, 25 October 1994). Cf a recent case where a 44-year-old woman sexually assaulted a sleeping 14-year-old boy and subsequently bore his child. He did not report the offence for over ten years. Chettle J of the Victorian Supreme Court imposed a 15 month wholly suspended sentence, stating that ‘But for the delay in this case, you would be going to prison’: ‘No Jail for Mother Who Had Teen’s Baby’, *Sydney Morning Herald* (Sydney), 10 March 2006, <http://www.smh.com.au/news/national/no-jail-for-mother-who-had-teens-baby/2006/03/10/1141701670483.html>.

<sup>185</sup> In the case of *Joachim Prehn* (COPS, Underwood J, 12 December 2002), it was held on appeal that although the delay of 18-20 months was taken into account at first instance, insufficient weight was accorded to it: *Prehn v The Queen* [2003] TASSC 55.

<sup>186</sup> *Michael Crowley* (COPS, Blow J, 31 July 2003). The offender’s sentence appeal was dismissed: see *Crowley v The Queen* [2003] TASSC 147.

<sup>187</sup> See *Sellen v The Queen* (1991) 57 A Crim R 313 (NSWCCA), 318 and *R v Tsiaras* [1996] 1 VR 398. For discussion, see ALRC, n 3, [6.120]; Rec 6-1 (IV).

<sup>188</sup> *York v The Queen* (2005) 225 CLR 466, [23].

<sup>189</sup> Warner, n 13, [3.702]. See *R v Piercey* [1971] VR 647; *Hauff v Police* (1994) 63 SASR 286 and *Ryan v The Queen* (2001) 206 CLR 267.

<sup>190</sup> *James v Turner* (2006) 15 Tas R 375, [8]. See also *Coates v The Queen* [2001] TASSC 141, [10] (Slicer J).

criminality),<sup>191</sup> but it has also been suggested that ‘the implication is that unemployed offenders are discriminated against, since that source of sentence reduction is not open to them’.<sup>192</sup>

There were 27 suspended sentences where the potential loss of employment was mentioned as a factor justifying suspension, more commonly where the offender had previously been in long-term unemployment.<sup>193</sup> There were a further 38 cases where the sentence was suspended in part due to the offender’s previous good employment record, a factor which would arguably also contribute to an assessment of the offender’s good character. In *Quinn*,<sup>194</sup> Slicer J imposed a partially suspended sentence, together with a community service order and compensation, ‘to take into account the possibility of continued employment’. Although he no doubt placed reliance on a pre-sentence report or submissions, there was no indication in his reasons as to what that employment might be, or the evidence suggesting that his employment would be continued. This is particularly odd, given that there were no other mitigating factors supporting suspension, and indeed, he noted that the offender had previously breached suspended sentences and failed to comply with conditions of community service. In such a case, it may have been preferable for Slicer J to have more fully articulated the basis for the view formed about the offender’s employment prospects in his reasons for deciding to partly suspend the sentence in order to make it clear to both the offender and the public that suspension of sentence on this basis is far from a matter of course and to note publicly the desirability of the offender pursuing these prospects.

### **Consequential loss**

It may be relevant to sentence that the offender has suffered some loss as a result of the offence, such as punishment through public exposure or loss of status and income.<sup>195</sup> In *Sugg*,<sup>196</sup> for example, the Court took into account the fact that the

<sup>191</sup> See Christopher Uggen, ‘Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism’ (2000) 65 *American Sociological Review* 529; Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of ‘What Works’*, Research Study 291, Home Office, London (2004) and Joe Graffam and Lesley Hardcastle, ‘Ex-prisoners and ex-offenders and the employment connection: Assistance plus acceptance’ in Susan Dawe (ed), *Vocational Education and Training for Adult Prisoners and Offenders in Australia: Research Readings* (2007) 37.

<sup>192</sup> Ashworth, n 21, [3.4.4]. See also the comments relating to good character and how these are more likely to benefit middle-class offenders: [5.3.1.2]. Note that it has recently been suggested in England that the Sentencing Guidelines Council provide guidance on ‘whether and why securing or retaining employment should be regarded as a mitigating factor’: Jacobson and Hough, n 21, x.

<sup>193</sup> Eg *Richard Roberts* (COPS, Evans J, 11 February 2004) and *Timothy Berry* (COPS, Evans J, 2 October 2003).

<sup>194</sup> *Adrian Quinn* (COPS, Slicer J, 12 May 2004).

<sup>195</sup> Eg *R v Daniels* (1999) 8 Tas R 397 and *McDonald v The Queen* (1994) 48 FCR 555 (FCA). For discussion, see Hough, Jacobson and Millie, n 7, 37; Ashworth, n 21, [7.4] and ALRC, n 3, [6.110]-[6.113]. The offender’s loss of job and probable loss of career was recently deemed a relevant factor in imposing a wholly suspended sentence on a South Australian teacher who had had sexual intercourse with a student: ‘Teacher Escapes Jail for Sex with Student’, *Sydney Morning Herald* (Sydney), 1 March 2006, <http://www.smh.com.au/news/national/teacher-escapes-jail-for-sex-with-student/2006/03/01/1141095782248.html>.

offender had been made to feel like a social outcast and was subject to harassment by his neighbours following his conviction for indecent assault on a child. In *Dinsdale*, Kirby J likewise adverted to the “social stigma” which necessarily followed the conviction, quite apart from a prison term’ as a relevant consideration in deciding to suspend a sentence.<sup>197</sup> Justice Kirby also said in the case of *Ryan*<sup>198</sup> that ‘in sentencing a prisoner such as the appellant, account might properly be taken of the particular features to which such a prisoner is exposed, including the additional opprobrium, adverse publicity, public humiliation and personal, social and family stress which he suffered.’ It would again seem that offenders from stable middle-class backgrounds are more likely to receive the benefit of this factor, thereby once again privileging their position as against that of offenders who may not have had as much to lose in the first place.<sup>199</sup>

There were 14 offenders, 11 of whom were first offenders, for whom the fact that they had already undergone some form of loss as a result of the offence was cited as a factor relevant to suspension of sentence. Most commonly, the punishment was in the form of loss of employment, relationship breakdown and loss of respect and standing in the community, as well as distress to the offender’s family. In the case of *Gray*,<sup>200</sup> the offender was a police officer who made uninvited sexual advances to young women when giving them a lift in a police vehicle. He was dismissed from the police force after 14 years of service and his actions were said to have had a ‘devastating effect on [his] family’.

In some cases, the suffering caused to the offender by the commission of the offence leaves little need to impose any further punishment. In the case of *Horner*,<sup>201</sup> the offender’s eight-week-old daughter was choking on her bottle of milk. The offender panicked and shook her, and she died as a result of the head injuries inflicted. The offender was accepted as having at all times been a loving father and had by the time of sentence already spent over a year in custody. Underwood J stated that the court was required to impose a sentence that would both mark society’s recognition of the sanctity of human life, and, secondly, acknowledge the tragic circumstances which led to the commission of the crime. He imposed a two year wholly suspended sentence, noting that the trauma caused to the offender and his partner, the victim’s mother, ‘cannot be measured, nor I suspect even properly understood by someone who has not lost a child of their own’. Accordingly, the circumstances of the offence

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<sup>196</sup> *R v Sugg* (Unreported, Tas CCA, Neasey, Cosgrove and Brettingham-Moore JJ, 3 June 1985). Cf *R v Lange* [2007] NTCCA 3, where a wholly suspended sentence was overturned on appeal, with the Court finding that too much weight had been placed on adverse publicity relating resulting from the offence.

<sup>197</sup> *Dinsdale*, n 6, [88] (Kirby J).

<sup>198</sup> *Ryan v The Queen* (2001) 206 CLR 267, [123] (Kirby J). See also [186] (Callinan J). Cf [52] (McHugh J).

<sup>199</sup> This privileging of the circumstances of middle class offenders is reflected in the judicial attitude expressed in *McDonald v The Queen* (1994) 48 FCR 555, 380 discussed in [5.3.1.2].

<sup>200</sup> *Phillip Gray* (COPS, Evans J, 24 September 2003). See also *Michael Crowley* (COPS, Blow J, 31 July 2003), discussed in [5.3.3.5].

<sup>201</sup> *David Horner* (COPS, Underwood J, 17 March 2003).

required the court to ‘adopt an individualised approach to sentencing, for this crime was a tragedy, as I say, not only for the mother, but also for you’. Judicial comments in Chapter 3 indicate that there would be little support for offence-based restrictions on the availability of suspended sentences in Tasmania and the TLRI has recently stated its opposition to introducing such restrictions.<sup>202</sup> Arguably, cases like *Horner* demonstrate the need for flexibility in the circumstances in which a suspended sentence can be imposed.

### 5.3.4.2 Hardship to others

Hardship to the offender’s family is generally regarded at common law as being of little weight,<sup>203</sup> with Green CJ commenting in *Sullivan*<sup>204</sup> that ‘frequently a sentence of imprisonment will impose hardship upon a convicted person’s dependants but that consideration must not be permitted to deter a judge from imposing a sentence of imprisonment if he thinks it appropriate’. This principle was recently endorsed in *Gibbins v White*,<sup>205</sup> with Crawford J suggesting that:

If the contrary was the case, courts would regularly be considering not the necessary punishment for the offender but the extent to which his or her family might be prejudiced by it. Part of the price to pay when committing a serious offence is that imprisonment may well cause hardship to others, and in most cases it should not be one of the factors which can affect what would otherwise be the right sentence. If courts allow the factor to be mitigatory, it can lead to the injustice of offenders without families receiving more severe punishment than those with families.

There is a more merciful approach taken in ‘exceptional circumstances’, such as where the offender has primary responsibility for dependent children or other family members.<sup>206</sup> This would seem to be backed by research on the deleterious effects of a

<sup>202</sup> TLRI, n 58, 32.

<sup>203</sup> See for example *Oliver v Tasmania* [2006] TASSC 95. Cf *R v M, H* (2007) 168 A Crim R 557 (SA CCA), where it was stated that the ‘effect of imprisonment on the respondent’s family is a factor, which when taken into account with other relevant factors, may give rise to a finding of “good reason” to suspend’: [30].

Cf *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(n); *Crimes (Sentencing) Act 2005* (ACT) and *Crimes Act 1914* (Cth), s 16A(2)(p), which require the court to take into account the probable effect that any sentence or order under consideration would have on the offender’s family or dependants. For comment on the ACT provision, see *Islam v The Queen* [2006] ACTCA. For discussion of the South Australian provision, see *R v Penno* (2004) 236 LSJS 457 and *R v Ivic* [2006] SASC 8. The Commonwealth provision was examined in *R v Hinton* (2002) 134 A Crim R 286 (NSWCCA), where it was declared to be clear that the provision should be read as if it were proceeded [sic] by the words “in an exceptional case”: [31]. See also *R v Togias* (2002) 132 A Crim R 573 (NSWCCA); *R v Berlinsky* [2005] SASC 316; *McAree v Barr* [2006] TASSC 37; *DPP (Cth) v Gaw* [2006] VSCA 51 and *Thomas v The Queen* [2006] NSWCCA 313. The ALRC has recently recommended expanding the provision to require that the court consider ‘the likely impact of the sentence on any of the offender’s family or dependants’: ALRC, n 3, [6.121.]-[6.127] and Rec 6-1 (VI).

<sup>204</sup> *Sullivan v The Queen* [1975] Tas SR 146 (NC1), 3.

<sup>205</sup> *Gibbins v White* [2004] TASSC 8, [19]. Citations omitted.

<sup>206</sup> See for example *Boyle v The Queen* (1987) 34 A Crim R 202 (WA CCA); *R v Maslen and Shaw* (1995) 79 A Crim R 199; *Ponsford v Wynwood* [1999] TASSC 21; *Williams v McLaughlin* (2000) 30 MVR 570; *R v Georgiadis (No 5)* [2001] TASSC 88; *R v Clark* [2003] NSWCCA 288 and *Egan v Western Australia* [2007] WASCA 182 and *Payne v The Queen* [2007] NTCCA 10. Cf *Wayne v Boldiston* (1992) 85 NTR 8; *Garnsey v Stamford* (2002) 131 A Crim R 427 (Tas SC); *R v D’Arrigo; ex parte A-G (Qld)* (2004) 42 MVR 54; *R v Schaefer and Schiworski* [2006] SASC 348 and *R v Stewart* (2007) 98 SASR 56. Note also *R v X* [2004] NSWCCA 93, where a wholly suspended

parent's imprisonment on his or her children<sup>207</sup> and the parsimony principle therefore assumes even greater significance when the future of successive generations is potentially affected.

In *Dinsdale*,<sup>208</sup> Kirby J considered that the impact that an immediate term of imprisonment would have on the offender and his family is a relevant factor to be taken into account in determining whether to impose a suspended sentence. Slicer J recently considered that as part of the process of determining whether to suspend a sentence of imprisonment,

the court may have regard to the character of the offender and the impact on the family unit, at least as a component of consideration of the prospects for rehabilitation. If the family unit be damaged or destroyed as a consequence of lengthy imprisonment, then the prospects of rehabilitation are diminished and the prospect that others might be, by reason of the destruction or damage, more likely to engage in anti-social conduct.<sup>209</sup>

The offender's family responsibility was mentioned by the judge as a relevant factor in deciding to suspend the sentence in 42 cases, with all but three offenders in this category having the care of dependent children or about to assume such responsibility.<sup>210</sup> Perhaps unsurprisingly, this was much more likely to be a factor for female offenders: although women accounted for only 13% of offenders overall, they accounted for 45% of cases where this factor was mentioned as a reason for suspension. It is also interesting to note that the median age of female offenders was 33, compared with 26 for men, perhaps also pointing to greater parental responsibility.

In *Smart*,<sup>211</sup> the fact that the offender wished to take care of one of his children was considered relevant, while in *Freeman*,<sup>212</sup> two of the offender's children were subject

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sentence imposed on a mother of five young children was set aside, the Court stating that the impact on her family did not constitute exceptional circumstances.

<sup>207</sup> See eg Donald West and David Farrington, *The Delinquent Way of Life: Third Report of the Cambridge Study in Delinquent Development*, Heinemann, London (1977), 109; Katherine Gabel and Denise Johnston (eds), *Children of Incarcerated Parents*, Lexington Books, New York (1995), 83; David Farrington, 'The Development of Offending and Antisocial Behaviour from Childhood: Key Findings from the Cambridge Study of Delinquent Development' (1995) 36 *Journal of Child Psychology and Psychiatry* 929; Diane Reed and Edward Reed, 'Children of Incarcerated Parents' (1997) 24(3) *Social Justice* 152, 59; David Rowe and David Farrington, 'The Familial Transmission of Criminal Convictions' (1997) 35 *Criminology* 177; NSW Legislative Council Standing Committee on Social Issues, *Children of Imprisoned Parents*, Report 12, Sydney (1997); Ann Cunningham, 'Forgotten Families - The Impacts of Imprisonment' (2001) 59(Winter) *Family Matters* 35; ACT Legislative Assembly Standing Committee on Community Services and Social Equity, *The Forgotten Victims of Crime: Families of Offenders and Their Silent Sentence*, Report 6, Canberra (2004); ALRC, n 3, [29.27]-[29.39]; Joyce Arditti and April Few, 'Mothers' Reentry into Family Life Following Incarceration' (2006) 17 *Criminal Justice and Policy Review* 103 and Rosemary Sheehan and Gregory Levine, *Parents as Prisoners: Maintaining the Parent-Child Relationship*, Criminology Research Council, Project Grant CRC 39/05-06, Melbourne (2007). It has recently been suggested in England that the Sentencing Guidelines Council provide guidance on 'whether and why family and childcare responsibilities should be treated as mitigating factors, and whether fathers should be treated differently from mothers': Jacobson and Hough, n 21, x.

<sup>208</sup> *Dinsdale*, n 6, [88]. See also *R v EPR* [2001] WASCA 214.

<sup>209</sup> *R v Bullock* [2003] TASSC 37, [13].

<sup>210</sup> In two cases, the offender cared for ill parents, while another cared for her ill husband.

<sup>211</sup> *Jamie Smart* (COPS, Slicer J, 13 December 2002).



to a care and protection order, but it was considered that continued contact with them might provide the impetus for the offender to get her life in order. The fact of parenthood will not, however, be regarded by the court as a get out of jail free card. In the case of *Dodge*,<sup>213</sup> the offender received a 12 month sentence for stealing almost \$16,000 from her employer. Cox CJ suspended seven months of the sentence, stating that because ‘of the impact on your younger children, in particular, of a custodial sentence, I feel justified in imposing a slightly lesser penalty in terms of immediate impact on you, but the circumstances do not warrant the total suspension of your sentence.’ As Slicer J noted in *Bessell*,<sup>214</sup> before wholly suspending a six month sentence in respect of a single mother whose children would otherwise have had to be taken into care, ‘[t]he offender ought realise that she can no longer use her own past or the welfare of her children as a reason or excuse for her own irresponsible and violent conduct.’

One final point to note on this issue is that the offender will of course still be exposed to the risk of imprisonment in the event of breach of the suspended sentence, although parental responsibility may also be given weight in any breach proceedings.<sup>215</sup> Nevertheless, caution should be exercised in cases where the offender has significant care obligations to ensure that a sentence of imprisonment really is warranted, and that no other lesser penalty would similarly serve the relevant sentencing objectives.

### 5.3.5 Other factors

In the foregoing discussion, I have adhered to the general sentencing principles set out in various sentencing texts.<sup>216</sup> In this section, I consider some of the comments made by the judges in deciding to suspend a sentence which do not accord with any of the factors discussed above.

#### 5.3.5.1 Mending one’s ways or one last chance

It has been accepted that it is permissible to suspend a sentence to give an offender ‘one last chance’ and the courts also speak of giving the offender an opportunity to ‘mend their ways’.<sup>217</sup> There were 25 cases in 2002-2004 where such terminology was employed by the sentencing judge. In *Young*,<sup>218</sup> for example, the offender gave a false name when intercepted while driving without a licence, as a result of which the man whose name he gave was arrested and taken into custody. Although the offender had ‘a significant record for vehicle related offences and threatening and assaulting a

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<sup>212</sup> *Tammy Freeman* (COPS, Slicer J, 21 August 2002).

<sup>213</sup> *Pamela Dodge* (COPS, Cox CJ, 13 April 2003).

<sup>214</sup> *Stacey Bessell* (COPS, Slicer J, 1 April 2003).

<sup>215</sup> See [7.6.2.2].

<sup>216</sup> Eg Warner, n 13.

<sup>217</sup> See *R v Buckman* (1988) 47 SASR 303; *Police v Cadd, Hall, Illes, Vlachos and Quinn* (1997) 69 SASR 150; *R v Groom* [1999] 2 VR 159; *R v Washband* [2000] QCA 486; *Bacich v Illich* (2000) 31 MVR 206; *R v Nguyen* (2001) 124 A Crim R 477; *R v Azzi* [2003] NSWCCA 10; *DPP (Vic) v Roe* [2005] VSCA 178; *R v Hill* [2005] SASC 380; *R v Tien* [2007] VSCA 56 and *DPP (Vic) v Coley* [2007] VSCA 91.

<sup>218</sup> *Adam Young* (COPS, Slicer J, 17 June 2004).

police officer whilst resisting arrest', he had previously not spent any time in custody. Slicer J imposed a four month wholly suspended sentence, suggesting that '[t]he offender will be afforded one last chance but needs to realise that breach of the terms of the suspended sentence will result in the execution of this order. *Kennedy*<sup>219</sup> was convicted for aggravated burglary and assault and received a 12 month sentence. Although she was regarded as 'disdainful of lawful authority', the last three months were suspended '[t]o encourage [her] to mend [her] ways'. Once again, this occurred seemingly in the absence of any evidence that the offender was inclined to do so.<sup>220</sup>

It would seem logical that whether an offender truly feels induced to mend their ways or regards a suspended sentence as their last chance will depend on how the offender perceives the sentence: if it is regarded as a 'let-off' or 'nothing', it may function as a poor incentive. If, on the other hand, it is regarded as a serious penalty, this may induce an offender to change his or her lifestyle. To this end, when a sentence is wholly suspended for this reason, it may be desirable to combine the sentence with a probation or community service order in order to give some immediate effect to the sentence. On the other hand, my findings in Chapter 6 suggest that offenders on a suspended sentence *simpliciter* in fact have better reconviction outcomes than those sentenced to combination orders,<sup>221</sup> thereby suggesting additional punitive bite to the sentence may not increase compliance. It is also important that there be rigorous prosecution of breaches to ensure that an offender is not given numerous 'last' chances. Unfortunately, my data in Chapter 7 point to lax prosecution practices, which may in turn promote further offending.

#### 5.3.5.2 Recent exposure to prison

In nine cases, the judge was impressed by the fact that the offender had recently served a term of imprisonment, which he believed to have had a 'salutary effect'.<sup>222</sup> In one case, the offender had participated in rehabilitation courses while in custody,<sup>223</sup> while another was reported to have positively transformed his life after being released from prison.<sup>224</sup> In *Kennedy*,<sup>225</sup> however, there appeared to be little basis for this assessment. Crawford J noted of the offender, who had chased a woman and her children down the street wielding an axe, that the offender was 'not a one off

<sup>219</sup> *Tabitha Kennedy* (COPS, Underwood J, 20 May 2004).

<sup>220</sup> It is in this context apposite to note the observation on English sentencers' decisions in so-called cusp cases that the 'inevitable subjectivity of the process of assessing hope or failure can help to explain sharp inconsistencies in sentencing practice between sentencers who all assert that they use custody only as an absolute last resort...what is a last resort for one sentencer (or bench, if a bench culture has developed) will not necessarily be the last resort for another – as the latter may typically perceive something in an offender's life to be a glimmer of hope that the former dismisses as irrelevant or does not even notice': Hough, Jacobson and Millie, n 7, 42.

<sup>221</sup> See [6.4.4].

<sup>222</sup> There were a further five cases where the offender's sentence was partly suspended because it was the offender's first taste of prison.

<sup>223</sup> *AJP* (COPS, Evans J, 28 April 2003).

<sup>224</sup> *Dwayne Rogers* (COPS, Evans J, 3 May 2004).

<sup>225</sup> *Hamish Kennedy* (COPS, Crawford J, 11 December 2002).

instant' (sic). He referred to the fact that the offender had been dealt with for no fewer than six assaults, before somewhat inexplicably stating:

Having regard to your record I consider that the Court has no alternative but to impose a sentence of imprisonment. And as I said when I came in here I expected that I would require you to serve it. However, on reflection I see that since you committed this crime you have spent about eight months in prison [for assault and destruction of property]. I am hopeful that as a result of that you have learned some form of lesson.

It is also worthy of mention that in another six cases, the fact that the offender had already spent time in custody on remand was considered relevant in deeming it appropriate to suspend the sentence.<sup>226</sup> Section 16 of the Act provides that where a court imposes a sentence of imprisonment, it *must* take into account any period already spent in custody in relation to the offence and *may* order the sentence to be back-dated.<sup>227</sup> In these cases, however, it would seem that the Court took time spent on remand into account in determining not the *length*, but the *mode*, of sentence, that is, whether it is to be served immediately or will be suspended.<sup>228</sup>

In *Polley*,<sup>229</sup> the offender received a three month wholly suspended sentence for giving a false name when caught drink-driving. Crawford J indicated that this was 'partly ...to take into account the one month he has already spent in custody as a result of his deception.' In practical terms, the effect of a one month sentence where time already served is taken into account and the sentence accordingly backdated would be the same in the event that it was a one-off act of offending. In the event of breach and activation of the suspended sentence, however, the offender might in fact be excessively penalised. If the objective in such cases is to impose a lenient penalty on an offender who has already suffered in prison, judges who impose a suspended sentence are nevertheless exposing him or her to being returned to custody in the event of a breach. It may therefore be preferable in such cases to order a short sentence to be backdated, so as to allow for immediate release, with no further punishment hanging over the offender's head. Cox CJ arrived at a similar conclusion in *Doyle*,<sup>230</sup> where he suggested that taking account of pre-sentence custody by partly suspending an otherwise appropriate sentence 'would not be just, were the sentence

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<sup>226</sup> It is interesting to note that in a recent New South Wales study, bail was considered a strong predictor of whether an offender received a suspended sentence: Poletti and Vignaendra, n 7. Unfortunately, I did not have access to data on offenders' bail status, but this finding points to the need for further research in Tasmania on the relevance of bail status to the decision to impose a suspended sentence. See also Jacobson and Hough, n 21, 26-28.

<sup>227</sup> Emphasis added. For discussion in the context of Federal offenders, see ALRC, n 3, [10.39]-[10.44] and Rec 10-2.

<sup>228</sup> Cf *R v Fice* [2005] 1 SCR 742, where the Canadian Supreme Court held by majority that under the *Criminal Code*, a conditional sentence cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender has spent in pre-sentence custody.

<sup>229</sup> *Graham Polley* (COPS, Crawford J, 28 April 2004).

<sup>230</sup> *R v Doyle* (1998) 105 A Crim R 199. See also *R v Newman* (2004) 145 A Crim R 361 (NSWCCA) and discussion in ALRC, n 3, [10.34]-[10.53] and Rec 10-2. Cf SAC Interim Report, n 50, where it was suggested that 'Where an offender has spent time on remand, a partially suspended sentence also has the benefit of allowing a court to recognise in a formal way the time the offender has already spent in custody': [4.12].

to be activated'. He argued that in most cases, rather than reducing the sentence to account for time already spent in custody, 'a far more satisfactory result and one which the public would more readily comprehend, would be to backdate the sentence allowing the prisoner's immediate release'.

### 5.3.6 Improper reasons for imposing a suspended sentence

The foregoing discussion lists a number of factors which the courts invoke in deciding to suspend sentences of imprisonment. There were also a small number of cases where the decision to suspend appears to have been made on an improper basis.<sup>231</sup> Indeed, some judges at times seem to regard suspended sentences as interchangeable with non-custodial penalties, thereby suggesting the incidence of net-widening.<sup>232</sup> In *Silczak*,<sup>233</sup> which was handed down some months before *Dinsdale*, Cox CJ, with whom Underwood and Blow JJ agreed, considered the interaction between suspended sentences and community service orders. It was suggested that there 'may well be a public perception that, as a general proposition, probation or community service orders are less punitive measures than suspended sentences of imprisonment'. The Chief Justice then went on to state,

Notwithstanding, then, that there may be a perception that [community service] orders are a milder form of punishment than a suspended sentence of imprisonment, persons subject to them are still at risk of imprisonment for an uncertain term on breach and have the added penalty of having to work, in any event, for a set number of hours.<sup>234</sup>

This statement was echoed in *Bessell*,<sup>235</sup> where Slicer J suggested that 'it might well be that for certain offenders a community service order may be viewed as involving more punishment of the offender than a suspended sentence'. Such observations serve to highlight a general ambivalence about the suspended sentence's putative status as 'the penultimate weapon in the extensive armoury of graduated penalties available to a judge of this Court for the punishment of crime'.<sup>236</sup> In *Miller*,<sup>237</sup> Slicer J suggested that because of the offender's 'working week, he is not regarded by the Probation Service as being a suitable candidate for a community service order. Accepting the above, it is not appropriate that he be sentenced to an immediate custodial term of imprisonment'. He then proceeded to impose a wholly suspended sentence, notwithstanding the fact that a suspended sentence should only be imposed if an immediate term of imprisonment would also be appropriate.

<sup>231</sup> See ALRC, *ibid*, [6.196]-[6.208] and Rec 6-7 in relation to factors irrelevant to sentencing.

<sup>232</sup> For discussion of the phenomenon of net-widening generally, see [1.5.4]. For data suggesting its possible incidence in the Supreme Court, see [4.3.2.1]. For the view that the inappropriateness or lack of availability of other penalties might also impact greatly on the sentencing decision, see Georgia Brignell and Patrizia Poletti, *Suspended Sentences in New South Wales*, Sentencing Trends and Issues, No 29, Judicial Commission of New South Wales, Sydney (2003).

<sup>233</sup> *R v Silczak* (2000) 116 A Crim R 58.

<sup>234</sup> *ibid*, [5] (Cox CJ).

<sup>235</sup> *Stacey Bessell* (COPS, Slicer J, 1 April 2003). Note also the NSW case of *R v Lord* [2001] NSWCCA 533, where Howie J acknowledged 'that it might well be that for certain offenders a community service order may be viewed as involving more punishment of the offender than a suspended sentence': [35].

<sup>236</sup> *R v Percy* [1975] Tas SR 62, 72-73 (Neasey J).

<sup>237</sup> *Troy Miller* (COPS, Slicer J, 3 September 2003).

The perception that a suspended sentence is somehow interchangeable with a fine is apparent in the decision of *Tasmania v O'Mahony*,<sup>238</sup> where Slicer J dealt with an offender who had pleaded guilty to illegal possession of abalone. Justice Slicer observed that the offender's 'income makes a fine inappropriate' and instead imposed a wholly suspended sentence, remarking that if the offender had 'been a processor or possessed assets or means commensurate with those reflective of the returns generated by the industry, a significant pecuniary penalty might be appropriate, but such is not the case here'.<sup>239</sup> This approach is clearly in breach of *Dinsdale* and seems to suggest that a rich offender can buy their way out of gaol, while an impecunious offender would have no such hope, 'an outcome which goes directly against the principle of equality before the law'.<sup>240</sup>

In the case of *Artis*,<sup>241</sup> Blow J held that because the offender's working hours made it inappropriate to impose a community service order, in the circumstances, 'the most appropriate course is to impose both a fine and a very short suspended sentence', while in *Hall*,<sup>242</sup> the offender received a suspended sentence because he had no means to pay a fine and wasn't fit enough to perform community service. Although the offender may have been delighted not to be required to participate in community work or part with money, it is essential that judges avoid such fallacious reasoning when sentencing if respect for the administration of justice is to be maintained.

In *Evans*,<sup>243</sup> Justice Blow noted that the offender had had sentences of imprisonment in the past, some of them partly or wholly suspended sentence. He stated:

I do not think it is appropriate to send her back to gaol, provided she stays out of trouble. I do not think it is appropriate to require her to perform community service either. I think the most appropriate course is to impose a suspended sentence. Because of the prior convictions involving harassing and menacing calls, I think it should be a sentence of one month's imprisonment.

He did not elaborate why community service was not appropriate, or how this could justify increasing the severity of the sentence when it was not appropriate to send her to gaol. There may have been very good reasons for assessing the offender as being ill-suited for community service, and as the Judicial Commission has observed, the 'inappropriateness...of other penalties might also impact greatly on the sentencing decision'.<sup>244</sup> Nevertheless, it is arguable that the reasons why community service was inappropriate, and indeed, why no other non-custodial order would have been

<sup>238</sup> *Tasmania v O'Mahony* [2004] TASSC 106 (Unreported, Slicer J, 31 August 2004).

<sup>239</sup> *ibid*, [8].

<sup>240</sup> Andrew Ashworth, *Sentencing and Penal Policy*, Weidenfeld and Nicolson, London (1983), 287, commenting on the decision of *R v Myers* [1980] Crim LR 191, where the Court of Appeal upheld a suspended sentence for a woman who couldn't have paid a fine. This was in direct opposition to that Court's earlier statement in *R v McGowan* [1975] Crim LR 113 that it was wrong in principle to impose a suspended sentence where a fine would have been considered appropriate if the offender had had sufficient means to pay the fine. See discussion in [1.4.1] in the context of broadcaster John Laws.

<sup>241</sup> *Shaun Artis* (COPS, Blow J, 14 May 2003).

<sup>242</sup> *Christopher Hall* (COPS, Underwood J, 18 June 2003).

<sup>243</sup> *Desiree Evans* (COPS, Blow J, 29 July 2002).

<sup>244</sup> Poletti and Vignaendra, n 7, 21. See also Hough, Jacobson and Millie, n 7, 36.

appropriate, should have been made explicit. Furthermore, one might infer that Blow J only decided the term of the sentence after deciding that it should be suspended, once again diverging from the two-stage process set out in *Dinsdale*. This assessment conforms with findings in Chapter 3 that there is difficulty applying *Dinsdale* and supports the need for statutory guidance as to the proper process for imposing a suspended sentence.

### 5.4 Conclusion

In this Chapter, I attempt to ascertain, from examining the judges' sentencing comments, the most prominent of the 'multitude of factors account[ing] for the decision to impose a...suspended sentence'.<sup>245</sup> In particular, the relevance of factors relevant to the offender, for example, youth or good character, is examined, as well as factors relevant to the offence, such as motive. The offender's response to the charges, including co-operation with the authorities and the relevance of the effect of the offence and sanction, including potential hardship to others, is considered. Finally, I discuss other factors considered by the Supreme Court in suspending a sentence, such as giving the offender 'one last chance' and present examples of cases where the sentencing judge appeared to impose a suspended sentence on an erroneous basis, for example, because the offender was impecunious.

Consistent with the discussion in Chapter 4, my findings indicate that the offender's lack of prior criminal record is the factor most often nominated by judges when imposing a suspended sentence, although the reconviction results in Chapter 6 suggest that first offenders are not in fact well served by a suspended sentence. I also discuss the issues surrounding the use of suspended sentences for offenders with substance abuse issues and propose that supervision and/or participation in a drug rehabilitation program be more frequently linked with suspension of the sentence. The use of suspended sentences for offenders with physical and mental health issues is discussed and the potential overuse of suspended sentences for the latter group considered. My findings also indicate that although the vast majority of offenders who received a suspended sentence did so after pleading guilty, the plea was explicitly referred to as a relevant factor in the imposition of a suspended sentence in only a small number of cases. Furthermore, in some cases recognition was given to the offender's remorse, even where there was no manifestation of this other than the guilty plea. I argue that it would be preferable in such cases for there to be some clear manifestation of true contrition, as offenders may otherwise receive a double benefit for pleading guilty.

My analysis also indicates that in some cases, judges cite factors, for example, the offender's poor health or good employment prospects, as relevant to the decision to suspend, but fail to provide any details of the evidence supporting that decision. This finding conforms with the ambivalence expressed in Chapter 3 by some judges about the need to set out detailed reasons for suspending a sentence.<sup>246</sup> The NSW Court of

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<sup>245</sup> Poletti and Vignaendra, *ibid*, 21.

<sup>246</sup> Note that similar views appear to prevail in the Northern Territory, where the Court of Criminal Appeal held in *Pappin v The Queen* [2005] NTCCA 2 that it is not incumbent upon a sentencing judge

Criminal Appeal, when recently reviewing the principles governing the use of suspended sentences,<sup>247</sup> stated that:

In determining whether a suspended sentence is an adequate form of punishment and is one which sufficiently reflects specific and general deterrence, it is necessary to have regard to the sentencing judge's reasons for suspending the sentence and, *in particular, whether the reasons given were sufficient to activate the sentencing discretion in that respect.*

The need for clear reasons was also articulated by a majority of the High Court in *Markarian*, asserting that the law 'strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public'.<sup>248</sup> Justice Kirby goes so far as to say that the scope of the duty to provide reasons is defined by

considerations which go far beyond the proper explanation to the parties, their representatives, the legal profession, judicial peers and the whole community of the decision in the particular case. For me, what is at stake is a basal notion of the requirement imposed upon the donee of public power. Unaccountable power is tyranny. If the exercise of power is accounted for, and is thought unlawful or unjust, it may be remedied. If it is hidden in silence, the chances of a brooding sense of injustice exists, which will contribute to undermining the integrity and legitimacy of the polity that permits it.<sup>249</sup>

In my view, the analysis in this Chapter demonstrates a need for judicial officers to more fully enunciate the relevant factors that make it appropriate to suspend a sentence and the evidence on which that decision is based, in the hope that this minimises the brooding sense of injustice which often surrounds the imposition of such sentences.

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to specifically relate particular features to the issue of suspension. See also *R v MAH* (2005) 16 NTLR 150, where it was said that 'judges, when imposing sentences, often give brief ex tempore reasons, and I would not wish it to be thought that it was necessary for a sentencing judge to give, in elaborate detail, reasons why a sentence is suspended in every case': [45] (Mildren J, Thomas and Southwood JJ agreeing).

<sup>247</sup> *R v BCC* [2006] NSWCCA 130, [57](k). Emphasis added. See also *R v JCE* (2000) 120 A Crim R 18, [19]. Cf *R v Anforth* [2003] NSWCCA 222, where it was held that while the absence of reasons for suspending the sentence added weight to the inference that an erroneous approach was taken, it is not an error in itself. It is interesting to note that there is no general requirement in NSW to give reasons for arriving at a sentence, other than when imposing a non-custodial order or suspended sentence in respect of certain offences to which a standard non-parole period applies: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54C.

<sup>248</sup> *Markarian v The Queen* (2005) 215 ALR 213, [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ). In this vein, ALRC has recently recommended that Federal sentencing legislation should require a court to state its reasons for decision when sentencing a federal offender for an indictable or summary offence, whether orally or in writing: ALRC, n 3, Rec 19-1. For discussion on the need to give reasons generally, see [19.1]-[19.14].

<sup>249</sup> Justice Michael Kirby, 'Reasons for Judgment: "Always Permissible, Usually Desirable and Often Obligatory"' (1994) 12 *Australian Bar Review* 121, 132. Cf Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743 and Michael O'Loughlen, 'Whether Courts Must Give Reasons for Decision' (1999) 73 *Australian Law Journal* 630, who suggests that this requirement might result in increased cost and delay and the absence of reasons does not amount to a denial of natural justice.

## 6. RECONVICTION ANALYSIS

*[W]hatever their imperfections, reconviction rates constitute the only accessible 'hard' data and for better or worse have been accepted as the standard by which the success of different sentencing measures is judged.*<sup>1</sup>

### 6.1 Introduction

As discussed in Chapter 1, the use of suspended sentences is often justified on the basis that they are an effective specific deterrent. The responses in Chapter 3 suggest that deterrence and rehabilitation are the main purposes to which sentencers have regard when imposing such a sentence. It is therefore somewhat surprising that the evidence supporting these objectives is scant at best. Furthermore, there is presently no published Australian research which examines reconviction rates for suspended sentences,<sup>2</sup> meaning that the sentencing debate on this issue is proceeding in something of an evidential vacuum. While it may be problematic to establish a cause and effect relationship, let alone control for all the variables which might impact on an offender's risk of re-offending, surely it is important to know the outcomes of various sentencing dispositions.

This Chapter expands the boundaries of our knowledge in a number of significant areas. Firstly, information is presented on reconviction rates for different sentencing dispositions imposed over a two year period in the Supreme Court. Reconviction rates are also examined on the basis of age, offence type, prior record and gender.<sup>3</sup> The study examines the frequency and seriousness of offending, thereby overcoming a common criticism of reconviction studies that they are an 'all-or-nothing' measure which does not take into account changes in offending patterns. The data are also analysed on the basis of combination orders, in order to better assess the suggestion that suspended sentences should routinely be given more bite. Finally, the study avoids the common error of misattributing reconviction rates to incidences of offending which occurred prior to the imposition of the relevant sentence, thereby contributing to an improved methodology for such studies.

Before explaining the methodology in more detail, criticisms of reconviction analyses are discussed, followed by relevant international reconviction analyses of suspended sentences.

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<sup>1</sup> Stephen Brody, *The Effectiveness of Sentencing*, Home Office Research Study 35, London (1976), 6.

<sup>2</sup> An earlier version of this Chapter has been accepted for publication: see Bartels, Lorana, 'The Weight of the Sword of Damocle: A Reconviction Analysis of Suspended Sentences in Tasmania', *Australian and New Zealand Journal of Criminology*, forthcoming (2008). Note also Weatherburn, Don and Bartels, Lorana, 'The Deterrent Effect of Suspended Sentences in Australia: A Comparison with Supervised Bonds', which was prepared after the research for this Chapter and is being revised for publication in the *British Journal of Criminology*.

<sup>3</sup> It was unfortunately not possible to undertake a similar analysis on offenders originally sentenced in the Magistrates' Court due to the size and quality of the data, but my findings highlight the need for further research to be undertaken in this area, including a comparable analysis of offenders who receive their sentence in the Magistrates' Court. The TLRI has also suggested the need for a reconviction study on conditional release orders: Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008, 71.



## 6.2 Previous reconviction analyses

### 6.2.1 The (f)utility of reconviction analyses

Brody has observed that the ‘crudest way to test the effectiveness of a sentencing measure is to determine what proportion of persons do not offend again’, but that such statistics must ‘be interpreted with great caution’.<sup>4</sup> The assessment of recidivism by reconviction rates has been criticised as a ‘simplistic and problematic criterion’ for assessing the effectiveness of sentences.<sup>5</sup> As others note, the measure is incapable of examining the effect of retribution, reparation, general deterrence and denunciation.<sup>6</sup> In addition, there are ‘major difficulties’ in using aggregate reconviction data to assess sentence effectiveness, since ‘variations in reconviction rates both between and within broad sentence types remain difficult to separate from differences in the particular characteristics of the offenders who receive them’.<sup>7</sup> Other common criticisms are that reconviction rates are an undercount of actual offending, are an all or nothing measure, are affected by changes in police and prosecution practice and do not account for severity or frequency of offence.<sup>8</sup>

There have been numerous reconviction studies and meta-analyses published in recent years.<sup>9</sup> There is some debate, however, over the value of comparing

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<sup>4</sup> Brody, n 1, 10.

<sup>5</sup> George Mair, 'Evaluating the Impact of Community Penalties' (1995) 2 *University of Chicago Law School Roundtable* 455.

<sup>6</sup> See Carol Hedderman, Darren Sugg and Julie Vennard, *Changing Offenders' Attitudes and Behaviour: What Works?*, Home Office Research Study 171, London (1997) and Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291, London (3rd ed, 2005).

<sup>7</sup> Caroline Friendship et al, 'Introduction: The Policy Context and Assessing the Evidence' in Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291, London (2004) 1, 3.

<sup>8</sup> See Brody, n 1; Chris Lloyd, George Mair and Mike Hough, *Explaining Reconviction Rates: A Critical Analysis*, Home Office Research Study 136, London (1994); Daniel Mears, 'The Sociology of Sentencing: Reconceptualizing Decisionmaking Processes and Outcomes' (1998) 32 *Law and Society Review* 667; David Moxon, 'The Role of Sentencing Policy' in Peter Goldblatt and Chris Lewis (eds), *Reducing Offending: An Assessment of Research Evidence on Ways of Dealing with Offending Behaviour*, Home Office Research Study 187, London (1998) 85; Carlos Carcach and Simon Leverett, *Recidivism Among Juvenile Offenders: An Analysis of Times to Reappearance in Court*, Research and Public Policy Series, No 17, Australian Institute of Criminology, Canberra (1999); Keith Spicer and Alison Glicksman, *Adult Reconviction: Results from the 2001 Cohort*, Home Office Online Report 59/04, London (2004); Caroline Friendship, Anthony Beech and Kevin Browne, 'Reconviction as an Outcome in Research: A Methodological Note' (2002) 42 *British Journal of Criminology* 442; Harper and Chitty, n 6 and Adrian Shepherd and Elizabeth Whiting, *Re-offending of Adults: Results From the 2003 Cohort*, Home Office Statistical Bulletin 20/06, London (2006).

<sup>9</sup> The best known meta-analyses have emerged from the ‘what works’ debate: see Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-Based Adult Corrections Programs: What Works and What Does Not*, Washington State Institute for Public Policy, Olympia (2006). See also Denis Ward, *The Validity of the Reconviction Prediction Score*, Home Office Research Study 94, London (1987); RG Broadhurst and RA Maller, 'The Recidivism of Prisoners Released for the First Time: Reconsidering the Effectiveness Question' (1990) 23 *Australian and New Zealand Journal of Criminology* 88; Ian Brownlee, 'Intensive Probation with Young Adult Offenders: A Short Reconviction Study' (1995) 35 *British Journal of Criminology* 599; Keith Soothill, Brian Francis and Elizabeth Ackerley, 'The Value of Finding Employment for White-collar Ex-offenders: A 20-Year Criminological Follow-up' (1997) 37 *British Journal of Criminology* 582; Moxon, n 8; Doris L MacKenzie et al, 'The Impact of Probation on the Criminal Activities of Offenders' (1999) 36 *Journal of Research in Crime and*

reconvictions of different sentencing dispositions as a measure of effectiveness. Broadhurst and Maller, for example, found that ‘most of the factors that contribute to better outcomes fall outside the influence of correctional agencies, although not necessarily outside the scope of global government policy (eg, employment)’<sup>10</sup> and considered it unclear whether differences in recidivism rates between custodial and non-custodial penalties ‘are the result of selection factors (ie only those most likely to succeed are placed on the non-custodial programme and would succeed irrespective of the penal measure) or the utility of the non-custodial programme’.<sup>11</sup>

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*Delinquency* 423; David Tait, *The Effectiveness of Criminal Sanctions: A Natural Experiment*, Report to the Criminology Research Council, 33:96-7, Canberra (2001); Cassia Spohn and David Holleran, 'The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders' (2002) 40 *Criminology* 329; Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy*, Australian Institute of Criminology, Canberra (2004); Spicer and Glicksman, *ibid*; Michael Prendergast et al, 'Amity Prison-Based Therapeutic Community: 5-Year Outcomes' (2004) 84 *The Prison Journal* 36; Hennessey Hayes, 'Assessing Reoffending in Restorative Justice Conferences' (2005) 38 *Australian and New Zealand Journal of Criminology* 77; Sue Triggs, *New Zealand Court-Referred Restorative Justice Pilot: Two Year Follow-up of Reoffending*, Ministry of Justice, Wellington (2005); Talina Drabsch, *Reducing the Risk of Recidivism*, Briefing Paper No 15/06, NSW Parliamentary Library Research Service, Sydney (2006); Craig Jones et al, *Risk of Re-offending Among Parolees*, Crime and Justice Bulletin No 91, NSW Bureau of Crime Statistics and Research, Sydney (2006); Stuart Kinner, *The Post-release Experience of Prisoners in Queensland*, Trends and Issues in Crime and Criminal Justice, No 325, Australian Institute of Criminology, Canberra (2006); Shasta Holland, Kym Pointon and Stuart Ross, *Who Returns to Prison? Patterns of Recidivism Among Prisoners Released from Custody in Victoria in 2002-03*, Corrections Research Paper Series Paper No 1, Department of Justice, Melbourne (2007); Robin Wilson, Janice Picheca and Michelle Prinzo, 'Comparison of Recidivism Rates' (2007) 46 *Howard Journal of Criminal Justice* 327 and Francis Cullen, 'Make Rehabilitation Corrections' Guiding Paradigm' (2007) 6 *Criminology and Public Policy* 717.

<sup>10</sup> Broadhurst and Maller, *ibid*, 102.

<sup>11</sup> *ibid*, 100. For an overview of the ‘what works’ literature generally, see Robert Martinson, 'What Works? Questions and Answers About Prison Reform' (1974) 35 *Public Interest* 22; Robert Martinson, 'New Findings, New Views: A Note of Caution Regarding Sentencing Reform' (1979) 7 *Hofstra Law Review* 243; Mark Lipsey, 'Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects' in Thomas Cook et al (eds), *Meta-Analysis for Explanation*, Russell Sage Foundation, New York (1992); Mair, n 5; Hedderman, Sugg and Vennard, n 6; Lawrence Sherman et al, *What Works, What Doesn't, What's Promising*, Report to the US Congress prepared for the National Institute of Justice, University of Maryland (1997); Sharon Levrant, Francis Cullen and Betsy Wozniak Fulton, John, 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?' (1999) 45 *Crime and Delinquency* 3, 18-19; Clive Hollin, 'Treatment Programs for Offenders: Meta-Analysis, "What Works," and Beyond' (1999) 22 *International Journal of Law and Psychiatry* 361; Adam Sutton, 'Crime Prevention: A Viable Alternative to the Justice System?' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Butterworths, Sydney (2000) 316; Adrian Cherney, 'Contemporary Comments: The Adoption of "What Works" Principles in Crime Prevention Policy' (2000) 12(1) *Current Issues in Criminal Justice* 93; Michael King, 'Deterrence, Rehabilitation and Human Nature: The Need for a Holistic Approach to Offenders' (2000) 24 *Criminal Law Journal* 335; Alison Liebling, 'The Uses of Imprisonment' in Sue Rex and Michael Tonry (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, Cullompton (2002) 105, 113-114; Tony Ward, 'Good Lives and the Rehabilitation of Offenders: Promises and Problems' (2002) 7 *Aggression and Violent Behavior* 513; Rick Sarre and Darren Parker, 'Policy-Making Criminal Justice' in Rick Sarre and John Tomaino (eds), *Key Issues in Criminal Justice*, Australian Humanities Press, Unley (2004) 297, 309; Katy Holloway, Trevor Bennett and David Farrington, *The Effectiveness of Criminal Justice and Treatment Programmes in Reducing Drug-related Crime: A Systematic Review*, Home Office Online Report 26/05, London (2005); Maria Borzycki, *Interventions for Prisoners: Returning to the Community*, Australian Institute of Criminology, Canberra (2005), 1, 29-31 and Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne (2007), [3.4].

Goldblatt in turn concluded that such studies ‘over the years have told a consistent story: any apparent differences between sentences, in terms of their impact on reoffending rates, are largely the result of other factors, such as the age and criminal history of the offender’.<sup>12</sup>

In an extensive study published by the English Home Office, a follow-up of some 18,000 offenders found no clear correlation between reconviction rates and penalty type.<sup>13</sup> Brody has commented on the ‘widespread conviction that no one type of sentence works any better – that is, is more effective in preventing recidivism – than any other’, but went on to say that it ‘has to be emphasized that even if it is true, research results have actually provided little evidence for such a belief’.<sup>14</sup> The Home Office recently declared that although re-offending rates vary considerably by type of disposal, the disposal given depends upon the characteristics of the offender which will also affect their chances of reoffending. Accordingly, the ‘relationship between re-offending and disposal is a complex topic’.<sup>15</sup>

Ancel argued that the ‘effectiveness of the suspended sentence cannot be deduced from a simple statistical comparison of the rate of recidivism in respect of persons who have undergone their sentences and those whose sentences have been suspended’.<sup>16</sup> He went on to explain that because suspension is granted by reason of a combination of favourable circumstances of the offence and the offender, ‘[t]his selective element in the application of the suspended sentence makes a general comparison valueless’.<sup>17</sup>

Notwithstanding the limitations of reconviction studies adverted to above, several commentators have concluded that reconviction rates are an appropriate standard for assessing the ‘success’ of sentencing dispositions.<sup>18</sup> Indeed, Harper and Chitty argue that ‘as an outcome measure the value of reconviction is not in dispute because it represents the only readily accessible empirical measure of re-offending’.<sup>19</sup> The passage of time since Ancel made his statement has seen an increasing interest in empirical analysis of sentencing measures to better understand their use, and the

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<sup>12</sup> Peter Goldblatt, ‘Comparative Effectiveness of Different Approaches’ in Peter Goldblatt and Chris Lewis (eds), *Reducing Offending: An Assessment of Research Evidence on Ways of Dealing with Offending Behaviour*, Home Office Research Study 187, London (1998) 123, 131.

<sup>13</sup> Lloyd, Mair and Hough, n 8.

<sup>14</sup> Stephen Brody, ‘How Effective are Penal Treatments?’ in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Punishment*, Hart Publishing, Oxford (2nd ed, 1998) 9, 9-10.

<sup>15</sup> Jack Cunliffe and Adrian Shepherd, *Re-offending of Adults: Results From the 2004 Cohort*, Home Office Statistical Bulletin 06/07, London (2007), 10.

<sup>16</sup> Marc Ancel, *Suspended Sentence*, Heinemann, London (1971), 61.

<sup>17</sup> *ibid*, 62.

<sup>18</sup> Eg Brody, n 1, 6; Chris May, *Explaining Reconviction Following a Community Sentence: The Role of Social Factors*, Home Office Research Study 192, London (1999); Friendship, Beech and Browne, n 8; Borzycki, n 11 and Carol Hedderman and Mike Hough, ‘Diversion from Prosecution at Court and Effective Sentencing’ in Amanda Perry, Cynthia McDougall and David Farrington (eds), *Reducing Crime: The Effectiveness of Criminal Justice Interventions* (2006) 53, 61.

<sup>19</sup> Harper and Chitty, n 6, 10.

paucity of Australian research in this area makes it appropriate to examine this issue further.

### 6.2.2 Previous reconviction analyses on suspended sentences

In this section, I give an overview of the existing international reconviction analyses pertaining to suspended sentences, including a discussion of their various methodological weaknesses.<sup>20</sup> As mentioned above, to date there has not been any published Australian study which examines reconviction rates following a suspended sentence.<sup>21</sup>

#### 6.2.2.1 England

Suspended sentences have been the subject of several reconviction studies in England. In 1981, Soothill undertook a study on 68 offenders who received a suspended sentence within the first year of their release from prison in 1968-69, following them up for ten years.<sup>22</sup> He also conducted a five-year follow-up study on a similar cohort of 48 men released from the same prison in 1972-73. He found that 78% of the first cohort and 57% of the second were reconvicted in the first year after the suspended sentence was imposed, with 84% and 71% respectively reconvicted during the operational period of the suspended sentence. By five years, 90% of the first cohort and 88% of the second had been reconvicted, leading the author to conclude that '[a]ny belief that the use of the suspended sentence will often deter the recidivist from engaging in further criminal activity can soon be dismissed'.<sup>23</sup> However, the lack of comparison with offenders receiving other sentencing dispositions makes it impossible to ascertain what the reconviction rate would have been for offenders with similar characteristics who had received some other penalty.

In 1979, the Home Office released an extensive reconviction study of 5,000 offenders convicted in January 1971, about one in six offenders convicted in England and Wales in the period.<sup>24</sup> In this study, 62% of male offenders in receipt of a suspended sentence were reconvicted within six years, compared with 71% for offenders who served a custodial sentence, and 63% for offenders under probation or supervision; the results for women were 31%, 50% and 33% respectively. The authors concluded that although age and prior reconviction 'dominated the reconviction pattern, it was generally the case that males given custodial sentences had higher reconviction rates than males given suspended sentences or probation or supervision orders',<sup>25</sup> but no allowance was made for time spent in custody or any

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<sup>20</sup> For discussion, see Weatherburn and Bartels, n 2.

<sup>21</sup> Cf breach studies, discussed further in [7. 3]. Note that the findings of another reconviction analysis, which compares suspended sentences and bonds with supervision are currently under revision for publication in the *British Journal of Criminology*: Weatherburn and Bartels, *ibid*.

<sup>22</sup> Keith Soothill, 'The Suspended Sentence for Ex-Prisoners Revisited' [1981] *Criminal Law Review* 821.

<sup>23</sup> *ibid*, 822.

<sup>24</sup> GJO Philpotts and LB Lancucki, *Previous Convictions, Sentence and Reconvictions*, Home Office Research Study 53, London (1979).

<sup>25</sup> *ibid*, 16.

pre-existing differences between the imprisonment group and those in receipt of a suspended sentence.

Further analysis on the Philpotts-Lancucki data was undertaken by Walker, Farrington and Tucker, who examined reconviction rates over six years for 2,069 men, adjusting for time spent in custody.<sup>26</sup> They found through log-linear analysis that choice of sentence was in fact associated with a difference in reconviction rates, although this ceased to apply in respect of offenders with five or more previous convictions. Significantly, reconvictions after a suspended sentence were 'markedly more numerous than the calculation from offence types would lead one to expect. They were worse than the rates for fines, which in turn were worse than the rates for imprisonment'.<sup>27</sup> Walker,<sup>28</sup> one of the study's authors, later wrote, however, that:

Strictly speaking, all that this tells us is that the suspended sentence is less effective than an actual prison sentence. It is theoretically possible that the absolute efficacy of an actual prison sentence is nil (or even a minus quality) and that the absolute efficacy of a suspended sentence is even less: that is, that it increases the likelihood of reconviction.

Bottoms also concluded, on the basis of the studies discussed above, that 'what little evidence there is suggests that the suspended sentence might have a marginally worse reconviction record than other sentences on comparable offenders'.<sup>29</sup> This would seem to contradict his earlier position that there was no significant correlation between penalty and reconviction, as he had asserted that although there was no direct study which established this in respect of suspended sentence, 'equally there is no evidence to suggest the special efficacy of the suspended sentence'.<sup>30</sup>

More recent English research is more optimistic about re-offending rates for offenders in receipt of a suspended sentence. An evaluation of a 'pre-accredited R&R [Reasoning and Rehabilitation] programme' was conducted between 1991 and 1992,<sup>31</sup> demonstrating a 'higher reconviction rate in the actual rate between the treatment and "other probation" comparison group at 12 months and at 24 months'. Of particular significance is the finding that offenders who had received 'suspended prison' had the lowest reconviction rate of all offenders in the sample: 30% after one

<sup>26</sup> Nigel Walker, David Farrington and Gillian Tucker, 'Reconviction Rates of Adult Males after Different Sentences' (1981) 21 *British Journal of Criminology* 357.

<sup>27</sup> *ibid.*, 359.

<sup>28</sup> Nigel Walker, *Why Punish?*, Oxford University Press, Oxford (1991), 44; cf Nigel Walker, *Sentencing: Theory, Law and Practice*, Butterworths, London (1985).

<sup>29</sup> Anthony Bottoms, 'Limiting Prison Use: Experience in England and Wales' (1987) 26 *Howard Journal of Criminal Justice* 171, 191.

<sup>30</sup> Anthony Bottoms, 'The Suspended Sentence in England: 1967-1978' (1981) 21 *British Journal of Criminology* 1, 18.

<sup>31</sup> Peter Raynor and Maurice Vanstone, *Straight Thinking on Probation (STOP): The Mid Glamorgan Experiment*, Centre for Criminological Research, University of Oxford (1997) and Peter Raynor and Maurice Vanstone, 'Straight Thinking on Probation: Evidence-based Practice and the Culture of Curiosity' in Gary Bernfeld, David Farrington and Alan Leshied (eds), *Offender Rehabilitation in Practice: Implementing and Evaluating Effective Programs*, John Wiley & Sons, Chichester (2001) 189, discussed in Mia Debidin and Jorgen Lovbakke, 'Offending Behaviour Programmes in Prison and Probation' in Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291, London (3rd ed, 2005) 31, 39.

year and 44% after two years, compared with 45% and 57% respectively for 'immediate prison', and 35% and 53% for community service.<sup>32</sup> It must be noted, however, that no statistical tests were carried out on the differences between the two groups. There was also no attempt made to match offenders on characteristics related to the choice of sentence and risk of re-offending.

In a slightly later study by Cocker,<sup>33</sup> 558 offenders were examined on behalf of the National Probation Service in West Yorkshire. Cocker found that offenders who received a suspended sentence had the lowest overall reconviction rate amongst the different sentencing dispositions, at 22%. This compared very favourably with 39% for conditional discharge, 37% for fines and an average of 45% for various 'community penalties' such as a Community Rehabilitation Order. However, as Cocker herself notes, the groups were poorly matched in terms of characteristics relevant to re-offending.<sup>34</sup> It is unclear, therefore, whether the differences she observed were a result of selection bias or an effect of the penalty itself.

### 6.2.2.2 New Zealand

Suspended sentences were available in New Zealand from 1993 to 2002.<sup>35</sup> Analysis published by the Ministry of Justice indicated that 'half of the sample were reconvicted for an imprisonable offence within the suspension period. This high reconviction rate suggests that suspended sentences have little deterrent effect'.<sup>36</sup> Men were more likely to be reconvicted (53%) than women (35%). The reconviction rate was lowest for drug offences (26%) and highest for property (59%) and traffic offences (60%). This research unfortunately provided no information on the reconviction rates for other sentencing dispositions. More recent research has shown that as many as 86% of prisoners in New Zealand are reconvicted within five years,<sup>37</sup> so reconviction rates for suspended sentences need to be viewed in that light.

### 6.2.2.3 Israel

The earliest cited reconviction study on suspended sentences was by Shoham and Sandberg and involved a comparison of 3,321 Israeli offenders in receipt of a suspended sentence in 1955-56 with a randomly selected control group who were

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<sup>32</sup> Results summarised in Mia Debidin and Jorgen Lovbakke, 'Offending Behaviour Programmes in Prison and Probation' in Gemma Harper and Chloë Chitty (eds), *The Impact of Corrections on Reoffending: A Review of 'What Works'*, Home Office Research Study 291, London (3rd ed, 2005) 31, Table 3.5, 'One- and two-year reconviction rates for pre-accredited R&R/STOP programme treatment and comparison groups'.

<sup>33</sup> Sarah Cocker, *Using Reconviction Data to Explore the Effectiveness of Community Penalties in West Yorkshire*, Report Number 2005/6-5, National Probation Service, West Yorkshire (2006).

<sup>34</sup> *ibid*, 10.

<sup>35</sup> See [2.4] for discussion.

<sup>36</sup> Wendy Searle, Judy Paulin and Tony Waldegrave, 'The Activation of Suspended Sentences of Imprisonment in New Zealand' in Philip Spier (ed), *Conviction and Sentencing of Offenders in New Zealand 1989 to 1997*, Ministry of Justice, Wellington (1998), [9.5].

<sup>37</sup> See Philip Spier, *Recidivism Patterns for People Convicted in 1995*, Ministry of Justice, Wellington (2001) and Philip Spier, *Reconviction and Reimprisonment Rates for Released Prisoners*, Ministry of Justice, Wellington (2002).

‘sentenced to a corrective measure other than suspended imprisonment’.<sup>38</sup> The authors found no significant differences in ‘the general success rate’ between the two groups, suggesting therefore that ‘we can only conclude that success and failure are related more to the offender’s personality and the type of offense he commits than to the type and severity of sentence he receives’.<sup>39</sup> There was, however, a highly significant difference between the success rate for first offenders and the rate for offenders with one previous offence, which led Brody to conclude that suspended sentences were ‘more effective when imposed on first offenders than recidivists’.<sup>40</sup> Shoham and Sandberg also found suspended sentences to be more effective for white-collar offenders. Unfortunately, this study did not control for other factors which might have influenced both the choice of penalty and risk of re-offending.

#### 6.2.2.4 Spain

A recent Spanish study by Cid<sup>41</sup> examined 119 offenders who received a suspended sentence in 1998-99, and followed them up for about five years to see if they served a custodial sentence in that time. Cid found that only 11% of first offenders who had received a suspended sentence re-offended, conservatively defined as being sentenced to prison, compared with 38% of offenders with either old convictions or convictions for offences committed after the current offence (pseudo-reconvictions). The only variable found to be statistically significantly correlated with recidivism was the offender’s criminal record. This study is unfortunately also of limited application as it does not make any comparisons of reconviction rates between suspended sentences and other sentencing dispositions.

#### 6.2.2.5 Other relevant studies

Although not a reconviction analysis of suspended sentences *per se*, it is also worth noting the study of 461 Icelandic prisoners, who were followed up for five years after their release from prison.<sup>42</sup> A discriminant function analysis showed that out of all the criminological, substance misuse, and personality variables examined, the number of previous suspended sentences was one of the three best predictors of re-conviction and further imprisonment, together with low social desirability and the number of days spent in prison.

It is also worth mentioning Tait’s work on NSW Local Court sentences (2001), which sought to assess the ‘impact of different penalties on subsequent re-offending’.<sup>43</sup> Although the study was an experimental one, Tait found it ‘possible to conclude with some confidence that prison is less effective than community

<sup>38</sup> Schlomo Shoham and Moshe Sandberg, ‘Suspended Sentences in Israel: An Evaluation of the Preventive Efficacy of Prospective Imprisonment’ (1964) 10 *Crime and Delinquency* 74.

<sup>39</sup> *ibid*, 79.

<sup>40</sup> Brody, n 1, 28.

<sup>41</sup> Josep Cid, ‘Suspended Sentences in Spain: Decarceration and Recidivism’ (2005) 52(2) *Probation Journal* 169.

<sup>42</sup> Marius Peersen et al, ‘Predicting Re-offending: A 5-Year Prospective Study of Icelandic Prison Inmates’ (2004) 10 *Psychology, Crime & Law* 197.

<sup>43</sup> Tait, n 9.

sanctions in reducing crime through re-offending'.<sup>44</sup> He went on to suggest that '[d]iversion from prison to community sanctions may also reduce re-offending, but the evidence is uncertain on this, partly because so few offenders get prison for minor offences that it is hard to get a reliable estimate'.

### 6.3 Methodology

The purpose of this study is to examine reconviction patterns following different sentencing dispositions. Details of the information obtained for the quantitative analysis on offenders sentenced in the Supreme Court in 2002-2004 are set out in Chapter 4.<sup>45</sup> The data for the reconviction study were collected by examining the Tasmania Police database of offenders' criminal records, ICE (Intrepid Centralised Enquiry), with assistance from the Department of Correctional Services in providing information on the dates of release of offenders who served their sentence in custody. Approval for the project was obtained from the Human Research Ethics Committee (Tasmania) Network.

As in Chapter 4, data were analysed in SPSS with  $p < 0.05$  as the test for statistical significance. Data were analysed using uni-variate, bi-variate and multi-variate analyses. In particular, a multi-variate regression model was developed, as set out in Appendix H, which included the following variables: offender age group, gender and prior record; offence type and seriousness, sentencing judge and disposition.

Where the regression model is referred to in this discussion in the context of one of these variables, for example, offence seriousness, it means that there has been a control or correction for the other variables in the model, ie offender age, gender and prior record; offence type; sentencing judge and sentencing disposition. It should be noted that although the regression model improves on simple tables and cross-tabulations by correcting for the main control variables, it is beyond the scope of this thesis to undertake a complete statistical analysis of *all* the possible control variables which influence an offender's risk of re-offending. In particular, as discussed in Chapter 4, information was not available on an offender's bail status at the time of sentencing, although this may be related to both suspension and risk of re-offending.

#### 6.3.1 Data coding issues

As set out in Chapter 4, there were 838 offenders in the 2002-2004 dataset. Of these, 26 offenders were aged under 18 at the time of sentence who were excluded as it was only considered appropriate to conduct the analysis in respect of adult offenders. This left for analysis 812 cases where an adult offender received a sentence for an offence (the index sentence). As can be seen from Table 6-1, however, only 588 offenders were ultimately included in the reconviction analysis. The following discussion sets out details for the key decisions which were made to establish the parameters of the offenders included in the follow-up dataset.

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<sup>44</sup> *ibid*, 28.

<sup>45</sup> See [4.2.2.2].



*Table 6-1: Offenders in 2002-2004 and follow-up datasets*

Group	Offenders in 2002-2004 dataset (n=812)	Offenders in follow-up dataset (n=588)
Group 1	Non-custodial order (n=109)	Non-custodial order (n=106)
Group 2	Wholly suspended sentence (n=238)	Wholly suspended sentence (n=229)
Group 3	Partly suspended sentence (n=101)	Partly suspended sentence not exceeding two years where offender released from custody by 1 July 2004 (n=81)
Group 4	Unsuspended sentence (n=364)	Unsuspended sentence not exceeding two years where offender released from custody by 1 July 2004 (n=172)

#### 6.3.1.1 Duplicate offenders

There were nine offenders who received more than one sentence in 2002-2004 who were eligible to be included in the follow-up study. For seven of these, the first sentence was counted as the index sentence, but in two cases, it was considered more appropriate to count the second case as the index offence. In one case, this was because the first sentence was longer than two years and the offender would otherwise have been excluded from the study. In the second case, the offender received a two month wholly suspended sentence and shortly thereafter received a 15 month unsuspended sentence for an offence committed prior to the imposition of the first sentence. As he was only on the wholly suspended sentence for six weeks before being sentenced to custody, it seemed more appropriate to regard the latter as the index sentence and follow him from two years from the date of release from custody.

#### 6.3.1.2 Length of sentence

In the original dataset, there were no wholly suspended sentences imposed where the term of the sentence exceeded two years, compared with 9% of partly suspended sentences and 21% of unsuspended sentences where the term of the sentence exceeded two years. In order to ensure that like custodial sentences were being compared, I decided that only sentences not exceeding two years would be included in the reconviction analysis, thereby capturing all wholly suspended sentences and the majority of other custodial sentences. Offenders were therefore only included in the follow-up study if their original sentence was a non-custodial order or a custodial sentence of two years or less.

#### 6.3.1.3 Date of release from custody

As set out further below, a decision was made to follow up offenders for two years from the date of sentence or release from custody. Offenders who had not been released by 1 July 2004 were excluded from the study as they would not have been at liberty for two years by July 2006, at which time I intended to commence collecting the relevant data.<sup>46</sup> It is acknowledged that there was unfortunately limited information provided on the date of any return to custody in breach of parole or the

<sup>46</sup> As it happened, data collection did not commence until December 2006 due to the time required for obtaining ethics approval.

suspended portion of the sentence, meaning some offenders may not have been at risk of offending in the community for the full period.

### 6.3.2 Further methodological issues

#### 6.3.2.1 Length and method of follow-up period

Two years was chosen as an appropriate follow-up period, as it is the ‘convention for reconviction studies in England and Wales’.<sup>47</sup> Other studies have found the first one or two years following release from custody to be the highest risk period for offenders.<sup>48</sup> This is borne out by the finding in the present study: in addition to recording whether an offender was reconvicted within two years, it was also recorded whether they were reconvicted at all in the time before the data were collected on 1 January 2007. This gave a much longer follow-up period – up to 4.5 years for an offender in Group 1 or 2 – and revealed that of all the offenders reconvicted within this extended period, 85% were reconvicted within the first two years. The decision to adopt a two-year follow-up period was also informed by data showing that in the Tasmanian Supreme Court, in 2004-5, 70% of cases were finalised in less than six months and 87% of cases were finalised in less than one year; only 1% of matters had been pending for more than two years.<sup>49</sup>

Where data on a legal intervention are gathered over a period of time and re-offending data are gathered at some time months or years later, the follow-up periods will be unequal, with such data said to be ‘censored’.<sup>50</sup> This may be regarded as ‘problematic because offenders will not have had the same opportunities (in terms of time) to commit new offences’.<sup>51</sup> To eliminate this problem, the present study sought to ensure that offenders were ‘at risk’ of re-offending for an equal period of time. This was complicated by the fact that the present study considers both custodial and non-custodial sentences. While an offender in receipt of a non-custodial order or wholly suspended sentence will be at risk of offending from the moment the sentence is imposed, an offender who spends time in custody will only be at risk of offending in the community from the date of release from custody. It has been suggested that for such offenders, ‘it is more meaningful to examine reconvictions from the date the offender was released from prison, rather than the date they were sentenced’.<sup>52</sup> There are accordingly two time periods used in this study: date of sentence for Groups 1 and 2 and date of release from custody for Groups 3 and 4.

<sup>47</sup> Friendship, Beech and Browne, n 8. Cf Payne, who recently suggested that ‘there is no gold standard observation period’: Jason Payne, *Recidivism in Australia: Findings and Future Research*, Research and Public Policy Series, No 80, Australian Institute of Criminology, Canberra (2007), x.

<sup>48</sup> See Brody, n 1; Pamela Southey, Beverley Braybrook and Philip Spier, *Rape Recidivism and Sexual Violation*, Department of Justice, Wellington (1994) and Lievore, n 9. Recent data analysed by the Home Office indicates that 64% of offenders who offended within two years of release from custody or imposition of a community sentence did so within the first six months: Cunliffe and Shepherd, n 15, 5.

<sup>49</sup> Australian Bureau of Statistics, *Criminal Courts Australia 2004-5*, Cat No 4513.0, Canberra (2006), Table 13.

<sup>50</sup> Hayes, n 9.

<sup>51</sup> *ibid*, 84.

<sup>52</sup> Spier (2002), n 37.

### 6.3.2.2 Measure of recidivism

Recidivism studies employ a range of definitions of recidivism, for example, the first time an offender comes into contact with police or is charged with an offence, while reconviction studies generally limit themselves to ‘conviction of another offence during a specified follow-up period’.<sup>53</sup> Reconviction is considered the ‘most common and conservative measure of recidivism’ being ‘a more certain indicator of guilt than re-arrest and possibly points to more serious reasons for re-entry into the criminal justice system’,<sup>54</sup> although it doubtless ‘under-estimates the true level of offending’.<sup>55</sup> In a recent New South Wales study, however, the incidence of finalised court appearance did not differ significantly from reconviction rates, at 68% and 64% respectively, thereby suggesting that reconviction may not be so conservative a measure of recidivism.<sup>56</sup>

### 6.3.2.3 Refining the ‘all-or-nothing measure’

A key criticism of reconviction studies is that they are a dichotomous ‘all or nothing’ measure and do ‘not take into account the severity or frequency of subsequent offending’.<sup>57</sup> As Dengate observed, ‘[s]uch measures as reconviction or subsequent imprisonment must be recognised as only limited indicators of “success”. It may in fact be some sort of success that an offender is offending less often, or is committing less serious crimes’.<sup>58</sup> Others have similarly acknowledged the importance of decreases in offending seriousness or frequency.<sup>59</sup> The present study overcomes both these issues by examining changes in offending frequency and seriousness,<sup>60</sup> and highlights the need for further research of this nature.

### 6.3.2.4 Pseudo-reconvictions

This study measures only convictions for offences which were committed after the date of sentence or release from custody. One key issue with reconviction studies is the tendency to include all convictions recorded after the index sentence, even those imposed for offences which were committed prior to the index sentence.<sup>61</sup> Inclusion of these instances of pseudo-reconviction – also referred to as immediate or spurious recidivism – means that the rate of reconviction is overestimated and may incorrectly attribute the supposed instances of re-offending to other variables. This is of particular significance in the context of suspended sentences, where the pronouncement of the sentence is thought by some to have a strong personal

<sup>53</sup> Friendship, Beech and Browne, n 8, 442.

<sup>54</sup> Lievore, n 9, 26.

<sup>55</sup> Toni Makkai et al, *ACT Recidivist Offenders*, Research and Public Policy Series, No 54, Australian Institute of Criminology, Canberra (2004), 38.

<sup>56</sup> Jones et al, n 9. Undetected instances of offending would nevertheless be excluded from analysis.

<sup>57</sup> Friendship, Beech and Browne, n 8, 442.

<sup>58</sup> Catherine Dengate, *The Use of Suspended Sentences in South Australia*, Department of Correctional Services, Adelaide (1978), 38.

<sup>59</sup> See for example Roger Hood and Richard Sparks, *Key Issues in Criminology*, Weidenfeld and Nicolson, London (1970); *Crime, Courts & Confidence: Report of an Independent Inquiry into Alternatives to Prison*, Esmeé Fairbairn Foundation, London (2004), 47 and Borzycki, n 11.

<sup>60</sup> For discussion of the scale used to measure offence seriousness, see **Table 4-2**.

<sup>61</sup> For discussion, see Lloyd, Mair and Hough, n 8.

deterrent effect. Counting offences committed prior to the imposition of such a sentence could therefore misrepresent the effect of the Sword of Damocles hanging over the offender from the time of sentence.

One response to this, as adopted by Tait, was to discount reconvictions within a week of the index offence.<sup>62</sup> This approach is, however, flawed, as sentences will typically take much longer to be resolved in court. The better, albeit more time-consuming, approach is to compare the date of commission of any further offences with the date of the index sentence, and record as reconvictions only those committed after the latter date. This was done in a recent NSW study, where the authors argued that this approach ‘addresses one of the major problems faced by past recidivism studies whereby some arrests or court appearances recorded during the follow up period relate to offences committed prior to the index prison sentence’.<sup>63</sup>

My analysis involves both offenders who were released into the community and those who served a custodial sentence. I therefore employ two measures of reconviction, both of which exclude offences committed prior to the index sentence. For offenders in receipt of a non-custodial order or wholly suspended sentence, a reconviction is counted as the conviction in court for an offence committed after the index sentence was imposed. For offenders who receive a partly suspended or unsuspended sentence, a reconviction is counted as the conviction in court for an offence committed after the release from custody.

#### 6.3.2.5 Appeal decisions

Because this is a study of reconviction outcomes, where a sentence was altered on appeal, the sentence imposed on appeal was counted in the study as the original sentence. In two cases, both following Crown appeals, this involved a change to the nature of the sentence: an unsuspended sentence was substituted for a wholly suspended sentence and a longer partly suspended sentence was substituted for an unsuspended sentence. In a further two cases, both defence appeals, the length of the unsuspended sentence was reduced.

#### 6.3.3 Dataset

Offender details in the 2002-2004 dataset were saved in a separate database and supplemented by the following information:

*Table 6-2: General data fields for reconviction analysis*

<b>Data field</b>	<b>Details and comments</b>
Reconviction in court in 2 years <sup>64</sup>	Yes/no
Seriousness of reconviction in 2 years <sup>65</sup>	Not reconvicted, minor, moderate or serious

<sup>62</sup> Tait, n 9.

<sup>63</sup> Jones et al, n 9, note 11.

<sup>64</sup> This does not include Traffic Infringement Notices.

<sup>65</sup> This was ascertained by assessing the National Offence Index (NOI) for each offence for which the offender was convicted. For further discussion of the process for classifying the seriousness of offences as ‘minor’, ‘moderate’ or ‘serious’, see [4.2.2.1] and especially **Table 4-2**.

In addition, the following information was gathered for all offenders on a wholly suspended sentence or non-custodial order:

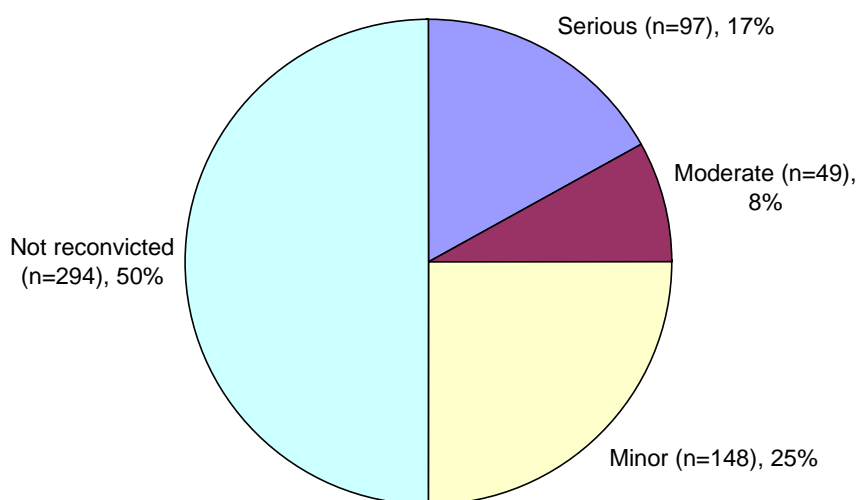
*Table 6-3: Data fields for wholly suspended sentences and non-custodial orders*

Data field	Details and comments
Number of offences for which convicted in the two years before and after the index sentence	0, 1, 2 etc
Most serious offence	Eg Burglary
Most severe sentence received	Unsuspended sentence, partly suspended sentence, wholly suspended sentence, community service order, fine, licence disqualification, good behaviour bond, other
Pseudo-reconviction	Yes/no
Whether pseudo-reconviction more serious than actual reconviction	Yes/no

## 6.4 Discussion of findings

### 6.4.1 Offence seriousness

*Fig 6.1: Reconviction rates and seriousness of further offending*



Exactly half of the offenders followed-up were reconvicted within two years. There were notable differences in reconviction rates on the basis of offender age, prior record and gender, offence type, sentencing disposition and sentence length. It is of particular relevance to note that wholly suspended sentences had the lowest reconviction rate. Examples of correlations should not, however, be mistaken for causal relationships. Shepherd and Whiting have observed that '[d]isentangling the effect on re-offending of offender characteristics and the effect of the disposal itself

## 6. Reconviction analysis

is difficult'.<sup>66</sup> This is clearly also apposite in the context of other sentencing variables. Before examining these variables in detail, however, I present data on the seriousness and frequency of the instances of further offending, which represent a significant advance on the existing reconviction literature.

As noted above, 50% of offenders were reconvicted within two years. Of those who were reconvicted, however, half were reconvicted only for minor offences. As set out in Figure 6.1, it is reassuring to find that only 17% of offenders followed-up were convicted of a new serious offence in the two year period. This is a finding that would not be readily apparent from 'classic' reconviction studies, which only measure reconviction on a dichotomous scale and do not acknowledge changes in offending patterns. Furthermore, this finding is of particular significance when it is considered that, as one would expect in the Supreme Court, the index offences involved predominantly serious examples of offending: 79% of offenders followed-up had committed a serious offence as their index offence (median NOI=30), compared with only 17% moderate (median NOI=80) and 4% minor offences (median NOI=123).

*Fig 6.2: Subsequent offending by index offence seriousness*

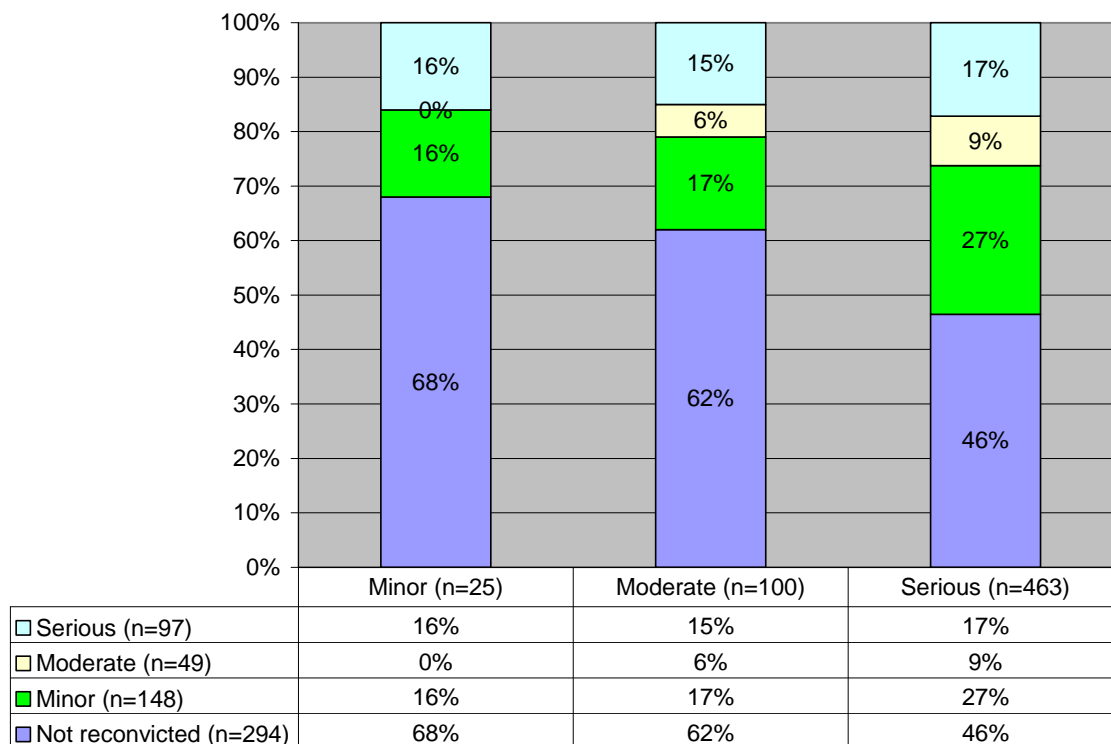


Figure 6.2 illustrates the subsequent offending by the seriousness of the index offence, with statistically significant differences in outcome,<sup>67</sup> although this no longer holds in the regression model. Interestingly, although an offender whose index offence was serious is less likely to 'go straight' than one whose index offence was minor (46% vs 68%), such an offender is barely more likely to commit a further serious offence (17% vs 16%). These findings accord with New Zealand data

<sup>66</sup> Shepherd and Whiting, n 8, 10.

<sup>67</sup>  $\chi^2=13.5$ ,  $df=6$ ,  $p<.05$ .

indicating that the seriousness of the offence for which a person is imprisoned is not a reliable predictor of that person's likelihood of committing a serious offence in the future, and that only a very small proportion of all released inmates are reconvicted for very serious offences.<sup>68</sup>

#### 6.4.2 Frequency of offending

Another important avenue for analysis is whether those who continue to offend change their frequency of offending. For this purpose, the number of offences for which a conviction was recorded in the two years leading up to the index sentence was compared with the number of such offences in the following two years. In order to ensure that all offenders were at risk for equal periods of time, this analysis was undertaken only for offenders in Groups 1 and 2.<sup>69</sup> As Table 6-4 demonstrates, the mean number of offences committed rose for offenders on a non-custodial order, from 2.2 to 3.1, but fell for those on a wholly suspended sentence, from 4.6 to 3.9. The median number also fell for wholly suspended sentences and remained the same for non-custodial orders.

*Table 6-4: Number of offences committed before and after sentence, Groups 1-2*

<b>Sentencing disposition</b>	<b>Number of offences: previous 2 years</b>		<b>Number of offences: subsequent 2 years</b>	
	Mean	Median	Mean	Median
Non-custodial order (n=106)	2.2	1	3.1	1
Wholly suspended sentence (n=229)	4.6	1	3.9	0

In order to examine this issue further, offenders who had not committed any offences in the two years leading up to the index sentence were excluded, as set out in Table 6-5. These findings show that the incidence of offending dropped for offenders on a wholly suspended sentence. In other words, even offenders who had been convicted in the two years leading up to the imposition of the suspended sentence improved in the frequency of their offending. The median number of offences committed in the subsequent two years fell in comparison with the previous two years (from 4 to 1). Amongst offenders on a non-custodial order who had been convicted in the previous two years, the median number of offences also fell, although not as dramatically (from 2.5 to 2), while the mean number of offences committed in fact increased (from 3.9 to 4.8). Further analysis of this nature needs to be undertaken, but these preliminary findings suggest that offenders on wholly suspended sentences perform better than those on non-custodial orders in terms of offending frequency, and that the reduction in the number of offences committed does not just apply in respect of offenders whose index offence was a one-off instance of offending.

<sup>68</sup> Spier (2002), n 37.

<sup>69</sup> It is acknowledged however that even with this approach, there were 29 offenders who had in fact served a custodial sentence in the two years prior to the index sentence and therefore had not been at liberty to offend for exactly two years.

*Table 6-5: Number of offences committed before and after sentence, Groups 1-2 where previous offending > 0*

Sentencing disposition	Number of offences: previous 2 years		Number of offences: subsequent 2 years	
	Mean	Median	Mean	Median
Non-custodial order (n=60)	3.9	2.5	4.8	2
Wholly suspended sentence (n=144)	7.2	4	5.8	1

### 6.4.3 Reconviction rates for key sentencing variables

The following analysis compares reconviction rates on the basis of several key sentencing variables and makes some tentative comments on the reasons for such differences and the relevance to suspended sentences.

#### 6.4.3.1 Sentencing disposition

*Table 6-6: Reconviction rates by sentencing disposition*

Sentencing disposition	Proportion reconvicted
Unsuspended sentence (n=172)	62%
Partly suspended sentence (n=81)	44%
Wholly suspended sentence (n=229)	42%
Non-custodial order (n=106)	52%

Numerous studies have examined the relationship between sentencing disposition and re-offending.<sup>70</sup> In the present study, there was a highly significant difference in reconviction rates on the basis of sentencing disposition.<sup>71</sup> The regression analysis confirms this result,<sup>72</sup> suggesting that sentencing disposition is a significant predictor of reconviction. As Table 6-6 demonstrates, wholly suspended sentences recorded the best outcome, with 42% of offenders reconvicted within two years, followed by partly suspended sentences (44%). This is in stark contrast to the earlier English studies discussed above, which found that suspended sentences had no better a reconviction rate than other sentencing dispositions. Although it is not surprising that offenders who received unsuspended sentences had the poorest outcomes (62%), it is surprising that offenders with non-custodial orders did not have a more favourable outcome (52%).

It is interesting to note that there was no statistically significant difference in reconviction rates between partly and wholly suspended sentences, even though one might expect partly suspended sentences, which are merely a different form of custodial sentence to be served immediately, to have a similar reconviction rate to

<sup>70</sup> See Paul Gendreau, Claire Goggin and Francis Cullen, *The Effects of Prison Sentences on Recidivism*, Solicitor General, Ottawa (1999); Doris L MacKenzie, 'Criminal Justice and Crime Prevention' in Lawrence Sherman et al (eds), *What Works, What Doesn't, What's Promising*, Report to the US Congress prepared for the National Institute of Justice, University of Maryland (1997) ; Spier (2001), n 37; Tait, n 9; Jeffrey Ulmer, 'Intermediate Sanctions: A Comparative Analysis of the Probability and Severity of Recidivism' (2001) 71(2) *Sociological Inquiry* 164 and Spohn and Holleran, n 9.

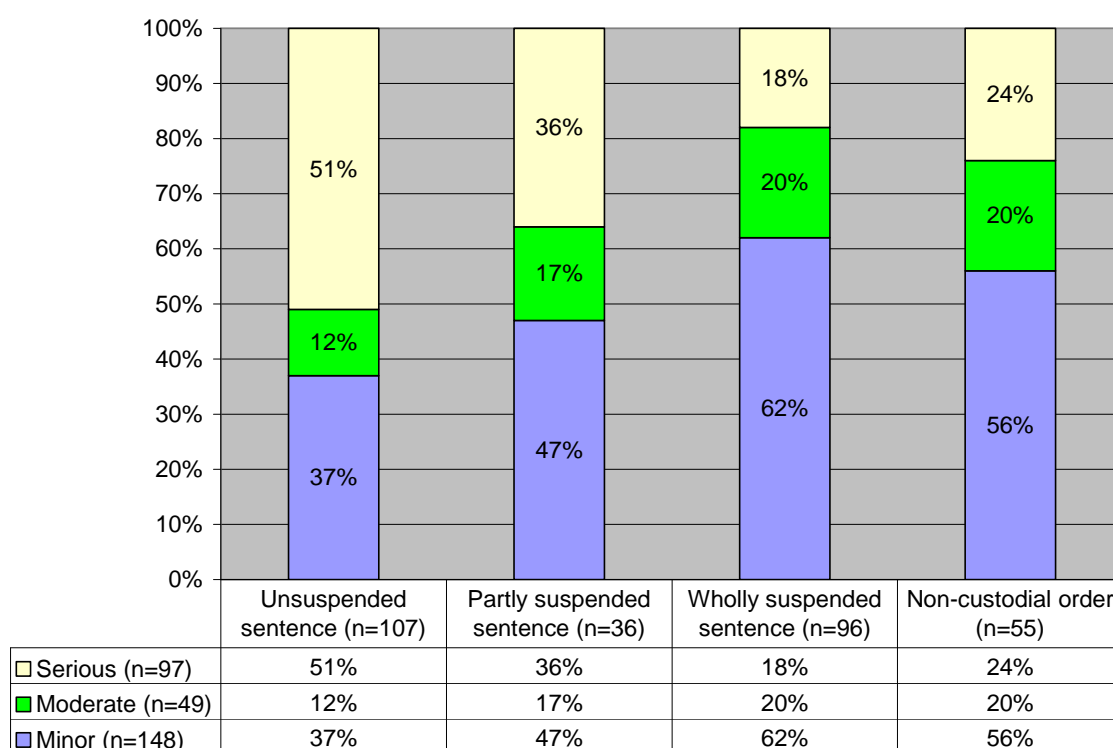
<sup>71</sup>  $\chi^2=17.4$ ,  $df=3$ ,  $p<.005$ .

<sup>72</sup>  $\chi^2=9.02$ ,  $df=3$ ,  $p<.05$ . While the regression model does not control for all possible relevant variables, it does account for some of the key confounding factors and tends to support the findings of the simpler analysis.



unsuspended sentences. It is always assumed that prison exacerbates criminality, but these figures may suggest otherwise, with offenders on a partly suspended sentence having similar reconviction rates to those on a wholly suspended sentence. This may suggest that the very fact of suspension may influence reconviction rates, rather than whether an offender serves time in a carceral environment. On the other hand, there may be other factors at play, for example, that judges will only select the ‘best’ cases for partial suspension, or that the same factors which compelled the judge to suspend a sentence also have a protective influence against further offending.<sup>73</sup> Of those who were reconvicted (n=294), offenders on a wholly suspended sentence were the group most likely to be reconvicted only of a minor offence, and least likely to be reconvicted of a serious offence, as set out in Figure 6.3. This difference in subsequent offence seriousness was highly significant.<sup>74</sup>

*Fig 6.3: Seriousness of reconviction offence by index sentence*



### **Serious offences**

It is also important to consider the offence for which the index sentence was imposed, with wholly suspended sentences often being criticised when used for ‘serious’ offences.<sup>75</sup> In this light, it is fruitful to examine reconviction rates for cases where the index offence was serious, as defined above. It must be noted, however, that since this discussion is limited to offenders whose sentence did not exceed two

<sup>73</sup> It has been noted that it is always difficult to draw a causal link between sentencing disposition and the likelihood of reconviction: see Matthew Hiller et al, 'Social Functioning, Treatment Dropout, and Recidivism of Probationers Mandated to a Modified Therapeutic Community' (2006) 33 *Criminal Justice and Behavior* 738.

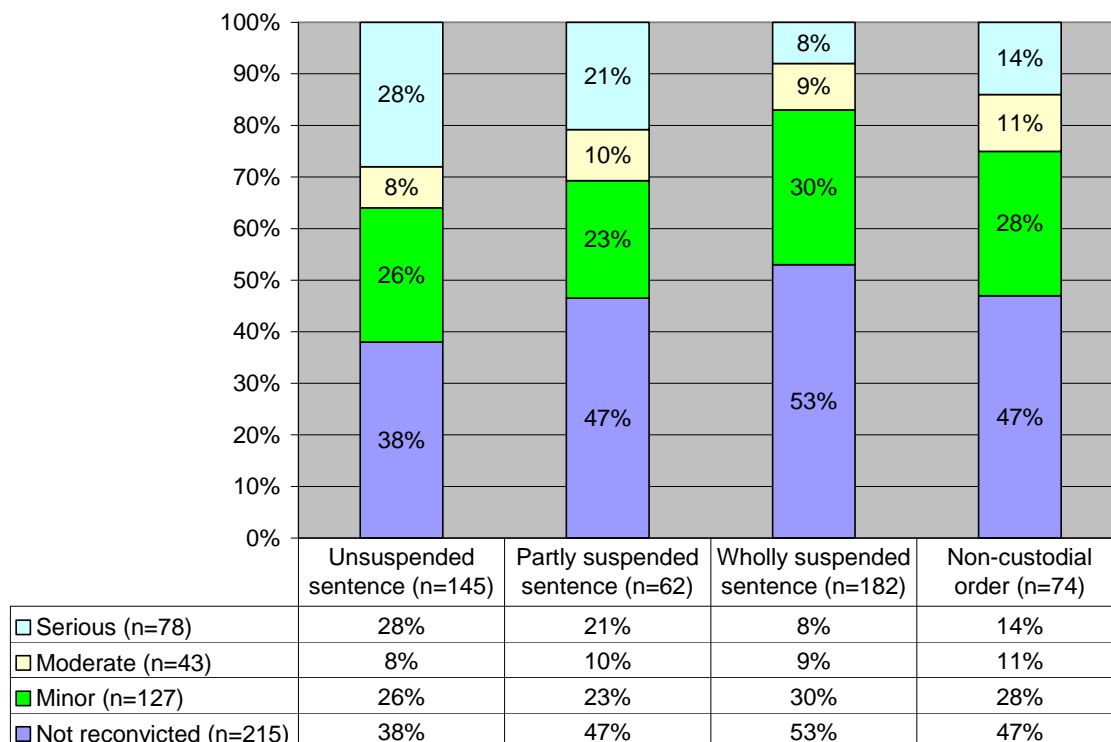
<sup>74</sup>  $\chi^2=27.4$ ,  $df=6$ ,  $p<.001$ .

<sup>75</sup> For discussion of the recent decision in Victoria to restrict the use of suspended sentences for statutorily defined ‘serious’ offences, see [2.2.2.3].

years, such offences cannot be said to be at the true upper end of the offending spectrum.

The reconviction rates for offenders with a serious index offence are plotted against sentence disposition in Figure 6.4. The differences in reconviction rates are highly significant.<sup>76</sup> The results show that offenders who receive a wholly suspended sentence for a serious offence are not only the group most likely not to be reconvicted (53%), but they are also least likely to commit a further serious offence (8%). They perform much better than offenders on a non-custodial order, of whom only 47% are not reconvicted and 14% are reconvicted for a serious offence. Offenders on a partly suspended sentence perform worse than on a wholly suspended sentence, but still better than offenders on unsuspended sentences, with more not reconvicted (47% vs 38%), and fewer serious offences (21% vs 28%). Although it is once again impossible to categorically state that serious offenders are less likely to be reconvicted on the basis of the sentence they receive, these findings support the view that a suspended sentence, and especially one which is wholly suspended, cannot be regarded from a recidivism perspective as an inappropriate penalty for serious offences. This finding also supports the argument against offence-based restrictions on the availability of suspended sentences.

*Fig 6.4: Reconviction rates by index sentence – serious index offence*



#### 6.4.3.2 Offence type

It has been suggested that the type of offence for which offenders were originally convicted influences the likelihood of rearrest, with property offenders particularly

<sup>76</sup>  $\chi^2=26.9$ ,  $df=9$ ,  $p<.005$ .

likely to re-offend.<sup>77</sup> Table 6-7 sets out the reconviction rates for various kinds of offences for all sentencing dispositions, as well for wholly suspended sentences, with wholly suspended sentences performing as well as or better than the overall reconviction rate for all offence types except robbery. The differences between the reconviction rates on the basis of offence type are statistically significant overall,<sup>78</sup> although this ceases to be the case in the regression analysis. When we consider wholly suspended sentences on their own, the differences between the reconviction rates on the basis of offence type are no longer statistically significant. This is possibly due to the small numbers of cases, since the reconviction rates for this subgroup appear almost as diverse as for the whole sample.

*Table 6-7: Reconviction rates by offence type*

Offence type	Proportion reconvicted – Total	Proportion reconvicted – Wholly suspended sentence
Violence	51% (n=141)	41% (n=56)
Sexual assault	22% (n=40)	15% (n=13)
Robbery	71% (n=42)	73% (n=15)
Property	53% (n=202)	41% (n=79)
Drugs	42% (n=50)	42% (n=26)
Other	49% (n=113)	43% (n=40)

The two most common offence types, violence and property, were further examined to ascertain whether there was a statistically significant difference in reconviction rates on the basis of sentencing disposition. Offenders convicted of a violence offence who had received an unsuspended sentence as their index sentence were more likely to be reconvicted (67%) than those in receipt of a partly suspended sentence (52%), while wholly suspended sentences performed better than non custodial orders (41% vs 46%), but these differences were not statistically significant.

There was, however, a statistically significant difference in reconviction rates between sentencing dispositions for property offences,<sup>79</sup> and these differences remained significant after regression analysis.<sup>80</sup> Suspended sentences performed particularly well: only 41% of offenders on wholly suspended and 45% on partly suspended sentences were reconvicted, compared with 74% for unsuspended sentences. It is again interesting to note how poorly non-custodial orders performed, at 58%. It is worth noting, however, that ‘property’ offenders are not a homogenous group, covering a broad range of conduct. Unlawful entry (n=105) had a reconviction rate of 68%, compared with 44% for theft (n=71), while deception offences (n=25) had a very low reconviction rate at only 19%. These differences were highly significant,<sup>81</sup> but it is unfortunately impossible to attribute these differences, especially the low reconviction rate for fraud offenders, to the sentencing disposition

<sup>77</sup> Makkai et al, n 55.

<sup>78</sup>  $\chi^2=21.9$ , df=5, p<.005.

<sup>79</sup>  $\chi^2=15.9$ , df=3, p<.01.

<sup>80</sup>  $\chi^2=10.8$ , df=3, p<.05.

<sup>81</sup>  $\chi^2=23.4$ , df=2, p<.001.

itself, due to the impact of other factors, for example, fraud offenders' better criminal records or stronger pro-social factors.

### 6.4.3.3 Prior record

It is widely acknowledged in the recidivism literature generally that prior criminal record is strongly associated with reconviction and this was strongly confirmed by the present study.<sup>82</sup> Only 35% of offenders with no prior convictions at the time of the index sentence<sup>83</sup> were reconvicted, compared with 52% of those with a minor record and 76% of those with a significant prior record. These differences were highly significant<sup>84</sup> and remained so in the regression model.<sup>85</sup>

Table 6-8 sets out the proportion of offenders reconvicted by prior record and sentencing disposition. This demonstrates that for offenders with no prior record, sentences where the offender is required to serve time in custody – unsuspended and partly suspended sentences – were in fact less likely to result in reconviction at 26% and 25% respectively than wholly suspended sentences (32%) or non-custodial orders (47%). Not only is this the opposite of Shoham and Sandberg's findings,<sup>86</sup> but it flies in the face of conventional wisdom that wholly suspended sentences are particularly appropriate for first offenders, in order to keep them from the supposedly corrupting influences of prison. Indeed, these findings may support the surprising view that prison can function as an effective deterrent for a first-time offender.

Offenders with a minor record, by contrast, appeared to perform comparatively better on suspended sentences, with 45% of those on a partly suspended and 49% on wholly suspended reconvicted, compared with 63% for non-custodial orders and 58% for unsuspended sentences (58%). There was a poor outcome for all sentencing dispositions for offenders with a significant record, but wholly suspended sentences in fact performed best of all, with 68% reconvicted. The interviews in Chapter 3 revealed a strong view that a suspended sentence should not be given to a recidivist.<sup>87</sup> On the other hand, some sentencers spoke of the desire to give offenders 'one last chance' and this also emerged in the analysis of judges' comments on sentence in Chapter 5.<sup>88</sup> The present finding may suggest that a decision to suspend a sentence on

<sup>82</sup> See eg Lloyd, Mair and Hough, n 8; Stuart Ross and Tricia Guarnieri, *Recidivism Rates in a Custodial Population: The Influence of Criminal History, Offence and Gender Factors*, Criminology Research Council, Canberra (1996); Carcach and Leverett, n 8; May, n 18; Ulmer, n 70; Patrick Langan and David Levin, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics Special Report, NCJ 193427, US Department of Justice (2002); Makkai et al, n 55; Cunliffe and Shepherd, n 15.

<sup>83</sup> For discussion of the measure used to assess an offender's criminal record as 'nil', 'minor' or 'significant', see [4.3.6.2]. The use of only three levels of prior record may be insufficient to fully assess record-related risk of reoffending, but limited data availability did not allow for a more detailed classification of prior record.

<sup>84</sup>  $\chi^2=65.0$ ,  $df=2$ ,  $p<.001$ .

<sup>85</sup>  $\chi^2=35.9$ ,  $df=2$ ,  $p<.001$ . It is again acknowledged that the regression model does not include all the possible variables which might influence re-offending risk, but these results tend to confirm the findings of the cross-tabulation analysis.

<sup>86</sup> See [6.2.2.3].

<sup>87</sup> See [3.4.3], (Q5).

<sup>88</sup> See [5.3.5.1].

this basis may be a powerful factor in assisting an offender – even one with a poor record – to go straight, and such offenders should therefore not be denied the opportunity of a wholly suspended sentence in appropriate circumstances.

*Table 6-8: Reconviction rates by prior record and sentencing disposition*

Sentencing disposition	Prior record		
	Nil	Minor	Significant
Unsuspended sentence (n=163)	26% (n=35)	58% (n=31)	77% (n=97)
Partly suspended sentence (n=78)	25% (n=32)	45% (n=29)	82% (n=17)
Wholly suspended sentence (n=221)	32% (n=116)	49% (n=80)	68% (n=25)
Non-custodial order (n=104)	47% (n=72)	63% (n=24)	75% (n=8)
Total (n=566)	35% (n=255)	52% (n=164)	76% (147)

#### 6.4.3.4 Age

Numerous studies have found that offending is something that people ‘grow out of’ and that desistance is a function of age,<sup>89</sup> with Baumer going so far as to suggest that ‘the hazard of reconviction decreases by approximately five per cent with each additional year of age’.<sup>90</sup> The significance of age on re-offending patterns would certainly appear to be borne out in the present study, where the mean age of offenders who were reconvicted was 27, compared with 35 for non-reconvicted offenders. The median ages were 24 and 32 respectively. Perhaps more significantly still, none of the offenders aged 55 or over at the time of the index sentence were reconvicted, compared with almost two-thirds (66%) of the 18-24 group. Table 6-9 presents the reconviction rates according to age group. The differences in these rates are highly significant<sup>91</sup> and the regression model supports this finding.<sup>92</sup>

*Table 6-9: Reconviction rates by age group at index sentence*

Age group	Proportion reconvicted
18-24 (n=242)	66%
25-34 (n=166)	54%
35-44 (n=94)	33%
45-54 (n=52)	21%
55+ (n=25)	0%

The data in Chapter 4 indicate that offenders aged 18-24 were more likely than average to receive a wholly suspended sentence, a finding supported by judicial comments in Chapter 3 that youthful offenders were most appropriate for the imposition of a suspended sentence.<sup>93</sup> Table 6-10 presents reconviction rates by age group and sentencing disposition, with statistically significant differences for both

<sup>89</sup> See Daniel Nagin and David Farrington, 'The Onset and Persistence of Offending' (1992) 30 *Criminology* 501; Lloyd, Mair and Hough, n 8; May, n 18; Spier (2002), n 37; Jones et al, n 9; Holland, Pointon and Ross, n 9 and Steve Moffatt and Suzanne Poynton, *The Deterrent Effect of Higher Fines on Crime: Driving Offences*, Crime and Justice Bulletin No 106, NSW Bureau of Crime Statistics and Research, Sydney (2007).

<sup>90</sup> Eric Baumer, 'Levels and Predictors of Recidivism: The Malta Experience' (1997) 35 *Criminology* 601, 616.

<sup>91</sup>  $\chi^2=78.2$ ,  $df=4$ ,  $p<.001$

<sup>92</sup>  $\chi^2=33.1$ ,  $df=4$ ,  $p<.001$ .

<sup>93</sup> See [4.3.6.3] and [3.4.3], (Q4) respectively.

the 18-24 age group<sup>94</sup> and the 25-34 age group.<sup>95</sup> As can be seen, offenders aged 18-24 performed much better on wholly suspended (53% reconvicted) and partly suspended sentences (55%) than on unsuspended sentences (86%) or non-custodial orders (72%). Although recent research in NSW found that younger offenders subject to supervised suspended sentences were less likely to successfully complete their sentences than older offenders,<sup>96</sup> this may simply accord with the general position that younger offenders have higher reconviction rates than older ones. The present findings would seem to support the view that young offenders should be given suspended sentences.

For offenders aged 25-34, unsuspended sentences had a much worse outcome but there was little difference between the other sentencing dispositions. Offenders in the 35-44 group performed best on non-custodial orders (25%) and there was surprisingly almost no difference between unsuspended (33%) and wholly suspended sentences (32%). For offenders aged 55 and over, it is clearly immaterial what sentence they receive, as they are very unlikely to re-offend. The data in Chapter 4 indicate that this age group was most likely to receive an unsuspended sentence and least likely to receive a wholly suspended sentence (57% and 15% respectively).<sup>97</sup> The fact that no offenders aged 55 and over in this study were reconvicted may support a wider use of wholly suspended sentences in appropriate circumstances.

*Table 6-10: Reconviction rates by age group and sentencing disposition*

Sentencing disposition	Age group				
	18-24 (n=242)	25-34 (n=166)	35-44 (n=94)	45-54 (n=52)	55+ (n=25)
Unsuspended sentence (n=170)	86% (n=65)	72% (n=53)	33% (n=30)	27% (n=11)	0% (n=11)
Partly suspended sentence (n=79)	55% (n=29)	48% (n=23)	38% (n=21)	0% (n=2)	0% (n=4)
Wholly suspended sentence (n=225)	53% (n=101)	46% (n=57)	32% (n=31)	17% (n=30)	0% (n=6)
Non-custodial order (n=105)	72% (n=47)	46% (n=33)	25% (n=12)	33% (n=9)	0% (n=4)

#### 6.4.3.5 Gender

Several previous studies have found women less likely to re-offend than men,<sup>98</sup> although some Australian studies have found comparable re-offending rates between men and women.<sup>99</sup> In the present study, there was also no significant difference according to gender, with women fractionally more likely to be reconvicted, at

<sup>94</sup>  $\chi^2=22.3$ ,  $df=3$ ,  $p<.001$ .

<sup>95</sup>  $\chi^2=9.62$ ,  $df=3$ ,  $p<.05$ .

<sup>96</sup> Ivan Potas, Simon Eyland and Jennifer Munro, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues, No 33, Judicial Commission of New South Wales, Sydney (2005).

<sup>97</sup> See [4.3.6.3].

<sup>98</sup> See eg Philpotts and Lancucki, n 24; Lloyd, Mair and Hough, n 8; Gendreau, Goggin and Cullen, n 70; Searle, Paulin and Waldegrave, n 36; Spier (2001), n 37 and Langan and Levin, n 82.

<sup>99</sup> Ross and Guarnieri, n 82 and Department of Human Services, *Recidivism Among Victorian Juvenile Justice Clients 1997-2001*, Victorian Government Department of Human Services, Melbourne (2001). For a recent summary of the literature, see Payne, n 47, 89-90.

50.5%, compared with 49.9% for men. The regression model demonstrates, however, that significant differences in reconviction rates emerge between men and women after correcting for age, prior record, offence type and seriousness, sentencing judge and sentencing disposition,<sup>100</sup> with women more likely to be reconvicted than men.

*Table 6-11: Seriousness of offending by gender*

Offence seriousness	Index offence		Reconviction offence	
	Male (n=493)	Female (n=95)	Male (n=246)	Female (n=48)
Minor	4%	5%	48%	60%
Moderate	14%	31%	16%	19%
Serious	82%	64%	35%	21%

Table 6-11 presents information on the seriousness of both the index offence and any reconviction offence by gender. Women's offending was less serious at both stages. Women also had less serious prior records:<sup>101</sup> whereas 43% of men were first offenders and 29% had a significant prior record, the figures for women were 55% and 10% respectively. These findings conform with the data in Chapter 4 showing that female offenders generally commit less serious offences than men and have less serious prior records.<sup>102</sup>

The reconviction rates for male and female offenders by sentencing disposition are set out in Table 6-12. On these figures, which showed highly significant differences,<sup>103</sup> men performed best on wholly suspended sentences (40% reconvicted), followed by non-custodial orders (46%). As one might expect, they performed worst on unsuspended sentences (65%). Women, by contrast, performed best on partly suspended sentences (20%), followed by unsuspended sentences (45%). Somewhat unexpectedly, women on wholly suspended sentences were more likely to be reconvicted than those who have served time in custody, at 51%, while a staggering 82% of women on non-custodial orders were reconvicted within two years. These differences were statistically significant,<sup>104</sup> but it is difficult to draw conclusions about the efficacy of any sentencing disposition. This is especially true where the numbers are small and this outcome should therefore not be interpreted as suggesting that non-custodial orders are a particularly inappropriate disposition for female offenders.

*Table 6-12: Reconviction rates by gender and sentencing disposition*

Sentencing disposition	Gender	
	Male (n=493)	Female (n=95)
Unsuspended sentence	65% (n=152)	45% (n=20)
Partly suspended sentence	50% (n=66)	20% (n=15)
Wholly suspended sentence	40% (n=186)	51% (n=43)
Non-custodial order	46% (n=89)	82% (n=17)

<sup>100</sup>  $\chi^2=11.5$ ,  $df=1$ ,  $p<.01$ .

<sup>101</sup>  $\chi^2=13.4$ ,  $df=2$ ,  $p<.01$ .

<sup>102</sup> See [4.3.6.4].

<sup>103</sup>  $\chi^2=21.0$ ,  $df=3$ ,  $p<.001$ .

<sup>104</sup>  $\chi^2=12.7$ ,  $df=3$ ,  $p<.01$ .

#### 6.4.3.6 Sentence length

There was no statistically significant difference in reconviction rates for custodial sentences (Groups 2-4) on the basis of length of sentence, but Table 6-13 demonstrates that offenders on the longest sentences were least likely to be reconvicted (40%), compared with 50% of offenders on sentences of less than six months. These findings conform with recent English data where longer custodial sentences were found to be associated with lower re-offending rates,<sup>105</sup> although Shepherd and Whiting cautioned that ‘the relationship between disposal and re-offending is complex and the evidence presented below does not, by itself, prove that longer custodial sentences cause lower re-offending rates’.<sup>106</sup>

Table 6-13 : Reconviction rates by sentence length

Sentence length	Proportion reconvicted
0>6 months (n=179)	50%
6>12 months (n=163)	55%
12>18 months (n=83)	46%
18-24 months (n=57)	40%

#### 6.4.4 Combination orders

As discussed in Chapter 3, judicial officers expressed considerable support for the use of combination orders as a means of giving additional bite to a suspended sentence, while the data in Chapter 4 indicates an increase in the use of such orders between 2000 and 2002-2004.<sup>107</sup> In my follow-up study, 47% of offenders who received a partly suspended sentence and 55% of offenders on a wholly suspended sentence also received at least one additional order.

Figure 6.5 sets out the number of additional orders imposed for partly and wholly suspended sentences and the number reconvicted. Increasing the number of additional orders imposed on the wholly suspended sentence appears to be associated with an increased likelihood of reconviction – 38% of offenders on a wholly suspended sentence *simpliciter* were reconvicted, compared with 42% with one additional order and 48% with two additional orders. Although 67% of offenders on a wholly suspended sentence with three additional orders were reconvicted, the number of such offenders (n=6) is too small to draw any firm conclusions. For offenders on a partly suspended sentence *simpliciter*, 49% were reconvicted, compared with 38% of those with one additional order and 50% of those with two orders, although the latter was again a very small group (n=4). No offenders on a partly suspended sentence received three additional orders.

<sup>105</sup> See Shepherd and Whiting, n 8 and Cunliffe and Shepherd, n 15. Cf Goldblatt, n 12.

<sup>106</sup> Shepherd and Whiting, *ibid*, 9.

<sup>107</sup> See [3.4.3], (Q9) and [4.3.4].



Fig 6.5: Reconviction rates for combination orders

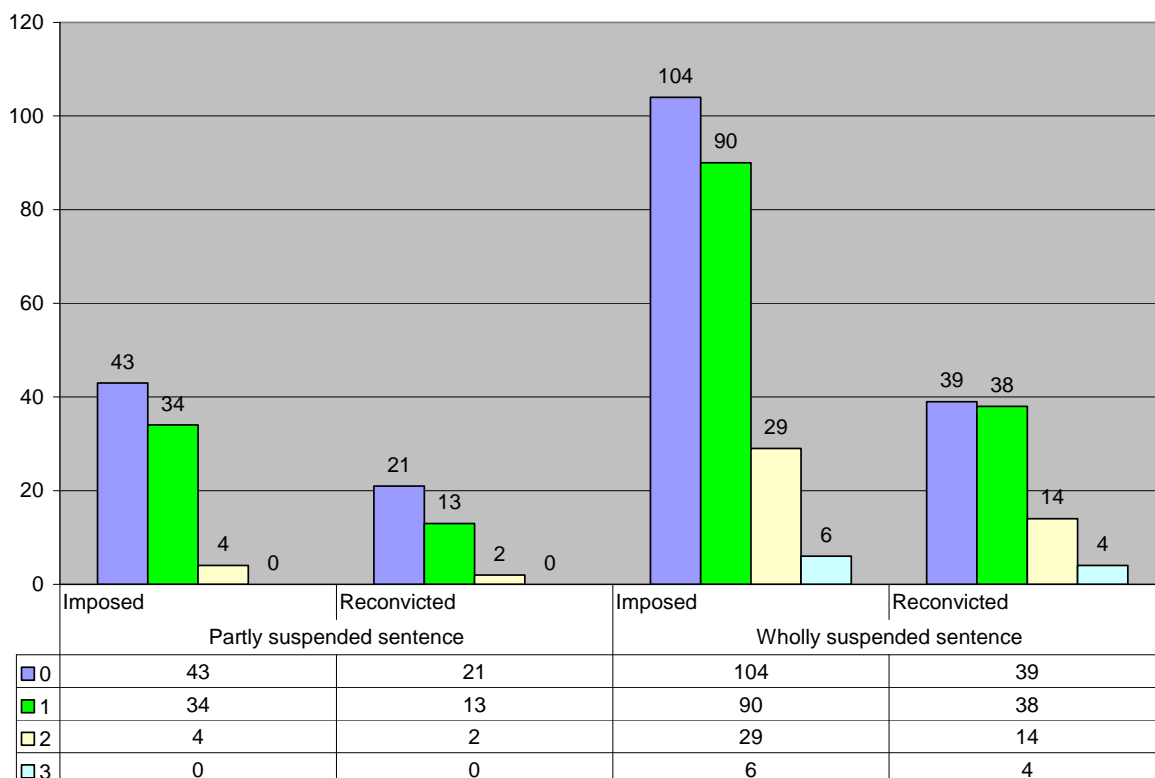


Table 6-14: Reconviction rates by combination order for wholly suspended sentences

Additional order imposed	Proportion reconvicted
Community service order (n=44)	48%
Probation (n=19)	58%
Compensation (n=37)	32%
Fine (n=15)	40%
Other (n=10)	40%

Table 6-14 presents reconviction rates for wholly suspended sentences on the basis of the nature of additional order imposed. Where an offender received a number of additional orders, they have been counted only once, in descending order of the severity of the additional order. Offenders who received a compensation order in combination with their wholly suspended sentence were the only group less likely to be reconvicted than offenders who received a wholly suspended sentence *simpliciter* (32% vs 38%). This is particularly significant given the finding in Chapter 4 that the use of compensation orders has increased dramatically in recent years.

A further interesting finding is that a very high proportion of offenders who received a probation order were reconvicted (58%). It is unclear however whether this poor outcome is because the higher degree of scrutiny picked up instances of offending which might otherwise have gone undetected,<sup>108</sup> or because the sentencing judge

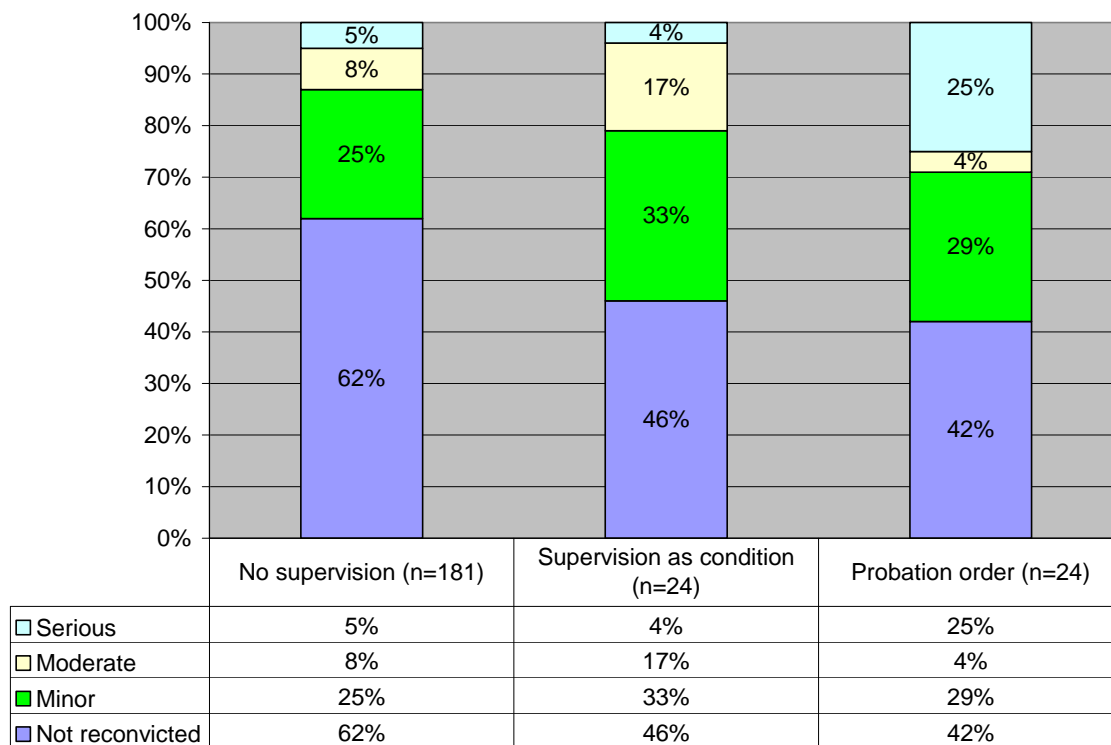
<sup>108</sup> Don Weatherburn, *Law and Order in Australia: Rhetoric and Reality*, Federation Press, Sydney (2004), 135.

## 6. Reconviction analysis

imposed the probation order on an offender who was in any event less likely to be able to comply with the suspended sentence, or for some other reason.

In order to examine this issue further, I compared the following sentencing dispositions: wholly suspended sentences in combination with a probation order, including those where a CSO was also imposed; wholly suspended sentences subject to a condition that the offender be supervised by a probation officer; and wholly suspended sentences with no supervision. The differences in reconviction rates between the three conditions were statistically significant<sup>109</sup> and are set out in Figure 6.6, which demonstrates that unsupervised offenders performed much better than those who were supervised, while an offender on a separate probation order was especially likely to be reconvicted of serious offences. By way of comparison, I also examined the 17 offenders with a probation order as part of their non-custodial order, of whom 71% were reconvicted within two years. These findings would seem to contradict the position that supervision will help an offender on a wholly suspended sentence give up offending and may call into question the effectiveness of supervision more generally, although such offenders still do better than those on unsuspended sentences. The present data also demonstrate a much poorer outcome than in New South Wales, where 84% of supervised suspended sentences were recently reported to have been completed successfully.<sup>110</sup> It is unfortunately beyond the scope of this paper to examine the issue of the effectiveness of probation supervision in greater depth, but this finding again highlights the need for more research on sentencing performance and outcomes in Tasmania.

*Fig 6.6: Reconviction rates for wholly suspended sentences by supervision*



<sup>109</sup>  $\chi^2=16.7$ ,  $df=6$ ,  $p<.05$ .

<sup>110</sup> Potas, Eyland and Munro, n 96.

### 6.4.5 Pseudo-reconvictions

As noted above, in this study, I avoided the common error of reconviction studies including pseudo-reconvictions by excluding from my analysis all instances of offending committed before the date of the index sentence for which a conviction was recorded only after the index sentence. In order to understand the effect of this common practice more fully, I also gathered information on the incidence of such pseudo-reconvictions for offenders in Groups 1 (n=106) and 2 (n=229). In this group of 335 offenders, there were 148 offenders with at least one pseudo-reconviction, accounting for 50% of offenders on a wholly suspended sentence and 32% of offenders on a non-custodial order. Significantly, in 49 of these cases, the pseudo-reconviction was the only reconviction entered in the two year follow-up period; in other words, these offenders did not in fact commit a new offence. In most studies of this kind, the pseudo-reconviction would have been counted as a reconviction, thereby overestimating the true level of re-offending after sentence. Table 6-15 demonstrates the dramatic effect of this overestimate in respect of wholly suspended sentences.

*Table 6-15: Actual reconvictions and pseudo-reconvictions for wholly suspended sentences*

<b>Pseudo-reconviction</b>	<b>Actual reconviction</b>		
	Yes	No	Total
Yes	69 (72%)	45 (34%)	114
No	27 (28%)	88 (66%)	115
Total	96 (100%)	133 (100%)	229

There were 96 offenders on a wholly suspended sentence who were reconvicted within two years for a new offence, that is, committed after the date on which the wholly suspended sentence was imposed. Of these, 69 also had a pseudo-reconviction, while 27 did not. Of the 133 offenders who did not commit any new offences, 45 had a pseudo-reconviction recorded. If these 45 instances of pseudo-reconviction were misattributed as actual reconvictions, this would falsely raise the reconviction rate from 42% to 62%. These findings therefore highlight the need for caution, when attempting to assess the impact (if any) of a particular sentencing disposition, in correctly identifying the incidence of offending after the imposition of a sentence, rather than merely counting all convictions entered after that time.

Furthermore, as discussed above, most reconviction studies do not examine the seriousness of any subsequent re-offending.<sup>111</sup> Those that do would still fail to account for changes in the seriousness of such re-offending if they do not distinguish between actual reconvictions and pseudo-reconvictions. My data indicate that there were 30 cases where the offender had a pseudo-reconviction where the offence was more serious than any actual reconviction. Accordingly, including pseudo-reconvictions when measuring changes in offence seriousness may give an overly pessimistic representation of offending patterns. This finding supports the position

<sup>111</sup> Cf Elissa Corlett, Grace Skrzypiec and Nichole Hunter, *Offending Profiles of SA Drug Court Pilot*, Office of Crime Statistics and Research, Adelaide (2005) and Grace Skrzypiec, *Offending at 16 to 20 Years of Age*, Office of Crime Statistics and Research, Adelaide (2005).

that future reconviction studies which purport to assess the seriousness of subsequent convictions need to more carefully account for the incidence and seriousness of pseudo-reconvictions.

### 6.5 Conclusion

This Chapter presents the findings of my reconviction analysis of offenders originally convicted in the Supreme Court. The key finding of my study is that offenders on a wholly suspended sentence have the best reconviction rates of the four sentencing options studied, followed by partly suspended sentences. Furthermore, of those who were reconvicted, offenders on a wholly suspended sentence were reconvicted of less serious offences than offenders with other sentencing options. These findings were maintained for offenders who committed a serious index offence, thereby suggesting that a suspended sentence cannot be regarded from a recidivism perspective as an inappropriate penalty for serious offences. This finding in turn lends support to the argument that there should not be offence-based restrictions on the availability of suspended sentences, although such a finding does not minimise the force of some critics' argument that suspended sentences violate the proportionality principle.

Information is presented on reconviction rates by offence type, with wholly suspended sentences performing as well as or better than the overall reconviction rate for all offence types except robbery. I also consider reconviction by prior record, demonstrating, somewhat surprisingly, that first offenders were in fact less likely to be reconvicted following a sentence requiring them to serve time in custody than on a wholly suspended sentence or non-custodial order, a finding which contradicts the conventional wisdom that wholly suspended sentences are particularly appropriate for first offenders. Analysis on the basis of age indicates that younger offenders were less likely to be reconvicted on wholly or partly suspended sentences than on unsuspended sentences or non-custodial orders, seemingly supporting the view that young offenders should be given suspended sentences.

Analysis of wholly suspended sentences combined with other orders showed that offenders with probation were most likely and those with compensation least likely to be reconvicted. Unsupervised offenders performed much better than those who were supervised, whether as a condition of suspension or in combination with the suspended sentence, thereby calling into question the effectiveness of routinely increasing the bite of suspended sentences. Finally, my examination of the impact of pseudo-reconvictions highlights the need for caution, when attempting to assess the impact – if any – of a particular sentencing disposition, in correctly identifying the incidence of offending after the imposition of a sentence, rather than merely counting all convictions entered after that time. My findings reveal that including pseudo-reconvictions may give an overly negative representation of offending patterns. Future reconviction studies which purport to assess the seriousness of subsequent convictions also need to more carefully account for the incidence and seriousness of pseudo-reconvictions.

This study is one of only two Australian studies to date to examine reconviction rates for what Tait has called 'the invisible sanction'.<sup>112</sup> Not only do my findings contribute significantly to the knowledge and understanding of suspended sentences, but the details of this study are also of broader importance in Tasmania, as there is dearth of reconviction information generally. The Tasmanian Government recently acknowledged that:

Currently the only recidivism or re-offending data available is the proportion of adult persons serving a period of community supervision or imprisonment who return to corrections within two years. This does not cover young offenders, diversions, cautions or suspended sentences. Consequently no targets have yet been established for the indicator and a dataset is not yet available to monitor progress. The lack of the dataset is also significant in that it makes it difficult to reliably evaluate the impact of initiatives aimed at reducing re-offending.<sup>113</sup>

Although this study does not purport to provide a definitive analysis of the comparative effectiveness of various sentencing dispositions,<sup>114</sup> and does not control for all the variables which influence re-offending risk, my findings fill a significant gap in the knowledge. The threat of a suspended sentence may be considered by the public to be as light as a feather, but my findings suggest that for many offenders, they do in fact 'work'.

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<sup>112</sup> David Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28 *Australian and New Zealand Journal of Criminology* 143.

<sup>113</sup> Tasmanian Government, *Submission to the Tasmania Together Progress Board: Five Year Review of Tasmania Together*, Hobart (2006), [http://www.dpac.tas.gov.au/divisions/policy/tastog/documents/Gov\\_Submission\\_TT\\_5YR.pdf](http://www.dpac.tas.gov.au/divisions/policy/tastog/documents/Gov_Submission_TT_5YR.pdf), 26.

The information to which the Tasmanian Government was referring is the data released biannually by the Commonwealth Steering Committee for the Review of Government Service Provision. The most recent data available indicate that 38% of Tasmanian prisoners released in 2002-03 were returned to prison under sentence within two years; this rose to 46% if subsequent community corrections orders were included. For offenders who had previously been subject to community corrections orders, the prognosis was somewhat better: 25% were sentenced to prison or a new correctional sanction within two years: see Steering Committee for the Review of Government Service Provision, *Report on Government Services*, Productivity Commission, Canberra (2006).

<sup>114</sup> See Kate Warner, 'The Effectiveness of Sentencing Options: What Works?' (Paper presented at the Local Courts of NSW Annual Conference, Sydney, 2 August 2007) for discussion.

## 7. BREACH ANALYSIS

*An indulgent response to breaches of conditions will encourage more breaches and undermine still further the deterrent power of the sanction.*<sup>1</sup>

### 7.1 Introduction

One of the key issues in this study was to explore how breaches are dealt with. The general principles on breach in Australia and overseas were considered in Chapter 2<sup>2</sup> and judicial views on breaches of suspended sentences presented in Chapter 3. This Chapter presents the findings of a breach analysis of offenders who received a partly or wholly suspended sentence in the Supreme Court in 2002-2004.<sup>3</sup> It was once again unfortunately beyond the scope of this thesis to conduct a similar analysis for offenders who had received a suspended sentence in the Magistrates' Court but my findings suggest the need for such research to be undertaken.

Information is presented on the nature of the offences committed in breach of the suspended sentence, including the seriousness and frequency of offending. I also examine the relevance of key sentencing variables, including age and length of sentence, and analyse relevant time periods, for example the time taken to re-offend. Finally, the COPS in the cases where breach action was taken are discussed in an attempt to develop a clearer understanding of the applicable principles on breach proceedings, as there is presently a lack of information in Tasmania on the principles which apply in such cases.<sup>4</sup>

### 7.2 Powers and policies in relation to breaches

A suspended sentence may be breached by committing an imprisonable offence or breaching a condition of the suspended sentence during the operational period of the sentence.<sup>5</sup> As set out in Chapter 2, there is no legislative presumption in favour of activation, although the TLRI has proposed introducing such a provision as 'there is a need to clearly communicate to offenders and to the community that breaches will be dealt with seriously if the order is to have integrity and not be regarded as a let-off with no serious consequences'.<sup>6</sup>

Section 27 of the *Sentencing Act 1997* (Tas) (the Act) presently provides that where this appears to have occurred, an 'authorised person' may apply to the court for an order. An 'authorised person' is defined in section 3 of the Act as meaning the

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<sup>1</sup> Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 54. See also 58; 71 and 176 for discussion of breached sentences.

<sup>2</sup> See [2.2.5].

<sup>3</sup> Due to time constraints and the volume of the dataset, it was unfortunately not possible to undertake a similar analysis in respect of offenders originally sentenced in the Magistrates' Court.

<sup>4</sup> Cf the recent detailed analysis in Victoria: Sentencing Advisory Council (Vic), *Suspended Sentences: Discussion Paper*, Melbourne (2005) (SAC DP), [4.45]-[4.58].

<sup>5</sup> *Sentencing Act 1997* (Tas), s 27.

<sup>6</sup> Tasmania Law Reform Institute, *Part 3: Sentencing Options*, Confidential Draft Report, January 2008 (TLRI), 31.

Director of Public Prosecutions (DPP), a police officer or probation officer.<sup>7</sup> Section 27(4) provides that if the court is satisfied that the offender has breached the condition of the suspended sentence without reasonable excuse or committed the new offence, the court may order the suspended sentence to take effect, order a substituted sentence to take effect instead, or vary the conditions on which the execution of the sentence was suspended.<sup>8</sup> The substituted sentence may be any sentence that the court could have imposed had it just found the offender guilty of the original offence, but no greater term of imprisonment is to be imposed by the substituted sentence than was imposed by the suspended sentence.<sup>9</sup> Where the original sentence is ordered to take effect, there is a presumption that this is to be immediate and cumulative on any other sentence, unless the court orders otherwise.<sup>10</sup>

In the TLRI Issues Paper, it was noted that there are ‘concerns that breach proceedings are neglected and many offenders breach without proceedings being initiated’.<sup>11</sup> This is contrary to the expectation of judges and magistrates, as discussed in Chapter 3, and certainly runs counter to what judicial officers tell offenders. As will be seen in the discussion below, it is clear that there are indeed numerous instances of breached suspended sentences which are not coming to the attention of the relevant authorities, suggesting an inadequate monitoring system.

In order to understand how breach proceedings operate in practice, I sought information from Tim Ellis SC, the Director of Public Prosecutions (DPP) and the Police Prosecution Service, who provided me with a copy of the Manual for his office. The Manual states *inter alia* that:

It is the Director’s policy to always make application for an order for a substituted sentence or that the sentence take effect upon there having been a breach of the conditions of suspension, unless there are extremely strong reasons not to make such application.<sup>12</sup>

He advised me that ‘We do not wait for referral of a matter from Community Corrections or Police Prosecution Services or the like – if counsel preparing a file see an apparent breach which has not been dealt with they make the application on their own initiative.’<sup>13</sup> He later elaborated on this, as follows:

when we are dealing with someone, we have their prior convictions and if we spot that it involves a breach...we make an application...that’s sort of standing instruction on

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<sup>7</sup> In practice, breaches of sentences imposed in the Supreme Court will be taken by the DPP. The Office of the Director of Public Prosecutions Manual contains a section entitled Review of Orders, which relates to suspended sentences, community service orders, probation orders and orders of good behaviour, which states, ‘All breaches of Supreme Court orders are to be dealt with by our Office’: Tasmanian Director of Public Prosecutions, *Manual: Review of Orders*, Hobart (2007) (DPP Manual), as at 7 April 2007.

<sup>8</sup> *Sentencing Act 1997* (Tas), s 27(4).

<sup>9</sup> *Sentencing Act 1997* (Tas), s 27(5).

<sup>10</sup> *Sentencing Act 1997* (Tas), s 27(6).

<sup>11</sup> Kate Warner, *Sentencing*, Issues Paper No 2, Tasmania Law Reform Institute, Hobart (2002), 71.

<sup>12</sup> DPP Manual, n 7.

<sup>13</sup> Email from Tim Ellis SC, Director of Public Prosecutions, to Lorana Bartels, 7 March 2007.

## 7. Breach analysis

counsel. We'd be most embarrassed if one slipped through. Now although it is a discretion, whether we do it or not, basically, we tend to do it.<sup>14</sup>

He conceded, however, that the process currently operates in a 'very ad hoc' fashion, explaining that due to the small number of breach applications brought to his attention, 'I've never thought about any guidelines for it'.

Although this discussion focuses on breaches of sentences imposed in the Supreme Court, analysis of breaches there would be incomplete without an understanding of the processes for dealing with breaches in the Magistrates' Court. Senior Constable Jillinda Mollon of Police Prosecution Services (PPS) was consulted and acknowledged that there were difficulties in correctly identifying and processing breaches.<sup>15</sup> She had previously prepared a document entitled *Suspended sentence applications*, raising some of the operational issues associated with breach applications, and was keen to see a more efficient system for dealing with suspected breaches of suspended sentences. The *Tasmania Police Manual* provides in relation to breaches of suspended sentences and probation orders that 'Operational Information Services [OIS] is to forward, at the earliest opportunity, details of any breach of suspended sentence or probation order to the relevant authority to enable further action to be considered'.<sup>16</sup>

Mollon described the processes for initiating breach applications, as follows: OIS upload information on all court convictions into the police database. OIS then notifies the PPS of any possible breaches.<sup>17</sup> PPS go through and determine whether there is a *prima facie* case for prosecution, with Mollon advising that 'the Sergeant here has sort of said to me, go down the same path', that is, to prosecute primarily matters where the offences are of the same nature, otherwise the task would be 'huge. One person could do this job full time because of the cumbersome process that is currently required'.

Mollon reported being generally happy with the assessment of perceived breaches by the OIS, stating 'I think they give them all to us', although it was conceded that in some cases 'where it's really complicated and they've got 20 pages of priors...they may have missed it'.<sup>18</sup> In her view this reflects the fact that the present process is so cumbersome, 'where it could be much more streamlined', and she advised that the Police Department was looking at ways to improve the administrative processes for identifying and dealing with breaches. In particular, she advocated a process whereby the application for breach was not required to be lodged with the Court and then served on the offender, but would instead be attached to the front of the file, to be

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<sup>14</sup> Meeting between Lorana Bartels, Tim Ellis SC and Professor Kate Warner, Hobart, 15 April 2007 (Meeting with DPP).

<sup>15</sup> Meeting between Lorana Bartels and Senior Constable Jillinda Mollon, Police Prosecution Services, Hobart, 24 April 2007 (Meeting with Mollon).

<sup>16</sup> *Tasmania Police Manual*, Hobart (2007), as at 24 April 2007, [12.1.8](1).

<sup>17</sup> As at 24 April 2007, there had been 20 such application since the beginning of the year, although 13 of these had arrived only that day.

<sup>18</sup> Meeting with Mollon, n 15.



handed up in the event of a guilty plea, noting that ‘there’s nothing in the legislation that says they have to be served. It’s just a practice that has evolved’.

At present, where there appears to have been a breach, the details of the magistrate who imposed the suspended sentence are obtained from the Court and the magistrate’s clerk contacted for a hearing date. An application is then prepared, setting out the details of the original offence and sentence and the breaching offences and sentences, which may involve obtaining files from other parts of the State. The application is then filed in court and required to be served in person upon the offender. As discussed in Chapter 3, this stage commonly presents difficulties, with estimates that half of all applications are unable to be served because the offender can’t be located.

The process is said to be different in Launceston Magistrates’ Court, where the Court will commonly adjourn proceedings for a short time following the proceedings for the breaching offence, with offenders sometimes remanded in custody. The breach application is prepared and listed for hearing the following day, with Mollon asserting that the application for breach could be ready for hearing within 24 hours ‘and then they’re sentenced the next day...so there’s no huge gap in the sentencing period’.<sup>19</sup> Mollon had been involved in preparing a report outlining various options for improving the breach process, including consideration of the model used in Launceston.<sup>20</sup> She said ‘I don’t know who saw it, but nothing was done that we saw’ but that it had been clearly identified as an issue to be resolved.

The discussion in Chapter 3 revealed a desire amongst judicial officers to have more feedback on the success rate of suspended sentences, although some respondents were concerned that such information could weaken their confidence in the sentence.<sup>21</sup> The DPP and Mollon advised that no data were currently maintained about the incidence of breaches but agreed that there was a need to collect and maintain such data. The findings in this Chapter constitute a significant contribution to the empirical knowledge on breaches of suspended sentences, although my findings suggest that judicial confidence that such cases will brought back to court is entirely misguided.

### 7.3 Previous breach studies

Although there will often be considerable overlap in offending patterns between reconviction and breach analyses, breach studies are limited to instances of offending during the operational period of the suspended sentence.<sup>22</sup> Breach analyses generally present information on the proportion of breached suspended sentences which are ultimately activated (hereafter ‘the activation rate’) and the proportion of suspended

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<sup>19</sup> *ibid.*

<sup>20</sup> See *Suspended Sentence Applications*, prepared by Senior Constable Jillinda Mollon of Tasmania Police Prosecution Services, Hobart (2006?; provided to me on 24 April 2007).

<sup>21</sup> See [3.4.6], (Q8).

<sup>22</sup> Note that the follow-up period in breach studies will vary, depending on the terms of the suspended sentence. For discussion of follow-up periods in reconviction studies, see [6.3.2.1].

sentence recipients who ultimately served time in custody on the breached suspended sentence (hereafter ‘the total imprisonment rate’).<sup>23</sup>

A weakness of some studies is that they only examine actioned breaches, that is, cases where the offender is prosecuted for breach. The problem with this approach is that this presumes prosecution action is taken in all appropriate cases and therefore gives a much more optimistic perception of the proportion of offenders in breach of their sentence. As will be seen further in my discussion below, there is a dramatic and overwhelming difference in Tasmania between actioned breaches and actual breaches, that is, where the offender commits further offences in breach of the sentence. Accordingly, the present study examines offenders’ criminal records to determine whether there was an actual breach, not just whether the offender was prosecuted for breach.

### 7.3.1 Victoria

The first Australian study on breaches of suspended sentences was Tait’s study in 1995,<sup>24</sup> and Victoria remains the Australian jurisdiction about which the most information is available.<sup>25</sup> Tait examined data on 2,804 offenders who had received a suspended sentence from a magistrate in 1990 and found that 18% breached their sentence.<sup>26</sup> Only 54% of offenders in breach in Tait’s study had their sentence activated, although this ranged from 40% for offenders with one or two counts proved at breach, to 71% for offenders with 15 or more additional offences. The total imprisonment rate was less than 10%. Tait attributed this low rate to a short operational period and the discretion to resentence at the breach,<sup>27</sup> factors which have both since been amended in Victoria with a subsequent increase in breach and imprisonment rates.

Data released by the SAC indicates that 36% of offenders who received a suspended sentence in the higher courts in 1998-99 subsequently breached their sentence.<sup>28</sup> Of these, 76% had their terms of imprisonment activated, giving a total imprisonment rate of 27%, almost three times higher than in Tait’s study ten years earlier. In the

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<sup>23</sup> This figure is ascertained by multiplying the proportion of offenders actioned for breach by the proportion sentenced to custody for the breach. For example, if 30% of offenders have breach action taken and 60% of those offenders have their sentence activated, this will give a total imprisonment rate of 18%.

<sup>24</sup> David Tait, ‘The Invisible Sanction: Suspended Sentences in Victoria 1985-1991’ (1995) 28 *Australian and New Zealand Journal of Criminology* 143, 155.

<sup>25</sup> Attempts to obtain information on the incidence and activation of breaches around Australia indicates that this information is not generally kept by relevant Government departments. Cf SAC DP, n 4 and Nick Turner, *Suspended Sentences in Victoria - A Statistical Profile*, Sentencing Advisory Council, Melbourne (2007).

<sup>26</sup> A slightly later dataset used by Freiberg and Ross had a breach rate of 17% : Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience*, Federation Press, Sydney (1999), 125.

<sup>27</sup> *ibid*, 158.

<sup>28</sup> SAC DP, n 4, [4.64]. This figure would seem to refer to actual, not actioned, breaches, as does the present study.

Magistrates' Court, 31% of the 2000-01 cohort breached their sentence and the sentence was activated in 64% of cases, giving a total imprisonment rate of 20%.<sup>29</sup>

More recent data published by the SAC indicates that after five years, 29% of suspended sentences imposed in the Magistrates' Court in 2000-2002 had been breached, compared with less than 9% of suspended sentences imposed in the higher courts,<sup>30</sup> with an overall breach rate of 28%. Furthermore, whereas 51% of offenders who breached a suspended sentence imposed in the Magistrates' Court did so in the first 12 months, only 13% of offenders sentenced in the higher courts did so.<sup>31</sup> Partly suspended sentences were slightly more likely to be breached than wholly suspended sentences in both the Magistrates' Court (32% vs 29%) and higher courts (10% vs 8%).<sup>32</sup> The breached sentence was restored in 63% of cases, giving a total imprisonment rate of 17%.<sup>33</sup>

### 7.3.2 New South Wales

Data published by the Judicial Commission of NSW indicate that suspended sentences accounted for almost 18% of the supervised community-based order types discharged in 2003 and 2004. Of these, 84% were completed successfully.<sup>34</sup> Unfortunately there are no data available on the activation rate of breached suspended sentences and the total imprisonment rate therefore cannot be calculated.

### 7.3.3 England

The first English study of breaches was conducted after suspended sentences had been available for two years and indicated very high breach rates, with Sherlock commenting that 'for 83.3% of persons under suspended sentence to be back before the courts within the operational period points either to some rather unreal optimism when the sentences were passed, or to some basic misunderstanding of how the device is meant to work'.<sup>35</sup> Furthermore, there was a strong presumption of activation – sentencers could only decline to bring the sentence into effect where it would be 'unjust' to do otherwise. Sherlock's figures indicate that the breached sentence was activated in 89% of cases in the Magistrates' Court and 81% of cases in the higher courts. The total imprisonment rate was between 67% and 74%.

Soon afterwards, a study by Oatham and Simon examined 1,000 offenders in receipt of a suspended sentence in 1968. They found that although the breach rate could not be calculated exactly, 'we have estimated that about 40 per cent of those awarded a suspended sentence in 1968 are likely to have breached the sentence and about 32

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<sup>29</sup> *ibid*, [4.81].

<sup>30</sup> Turner, n 25, 8.

<sup>31</sup> *ibid*, Fig 19.

<sup>32</sup> *ibid*, Figs 20 and 21.

<sup>33</sup> *ibid*, 13.

<sup>34</sup> Ivan Potas, Simon Eyland and Jennifer Munro, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues, No 33, Judicial Commission of New South Wales, Sydney (2005).

<sup>35</sup> Michael Sherlock, 'The Suspended Sentence: What Has Gone Wrong?' (1970) 120 *New Law Journal* 1144, 1146.

per cent are likely to have had the sentence activated'.<sup>36</sup> As in the Sherlock study, activation rates were high, at 83%, giving a total imprisonment rate of 34% for men and 27% for women.

Data released by Bottoms in 1987,<sup>37</sup> based on 1985 Home Office data, indicated that 77% of partly suspended and 71% of wholly suspended sentences were activated in full on breach, with a further 5% and 6% respectively activated in part. There was accordingly an activation rate of 82% for partly suspended and 77% for wholly suspended sentences. Unfortunately, this study did not report what proportion of suspended sentences were being breached and the total imprisonment rate therefore can not be calculated from these data.

Suspended sentences were not widely used in England between 1991 and 2005.<sup>38</sup> A recent report published by the Centre for Crime and Justice Studies stated that breach of suspended sentences and effective enforcement of breaches 'have been major concerns for more than a decade and, as noted previously, were a particular worry prior to the introduction of the new orders'.<sup>39</sup> The report went on to note that although there was 'not a great deal of evidence about breach and enforcement', Home Office figures indicated that 800 offenders had been received into custody for breach of a suspended sentence between January and August 2006. Furthermore, given the increasing use of suspended sentences, 'it is possible that this number will continue to grow – an undesirable development considering the current size of the prison population', with the Home Office 'admit[ting] that the number of breaches of Suspended Sentence Orders is likely to be double that assumed in current prison population projections'.<sup>40</sup> The authors noted that 'several [probation officer] staff claimed that the only reason that all breaches did not end up in custody was that magistrates were only too aware of the political sensitivities around prison overcrowding and were reluctant to revoke and imprison breaches'<sup>41</sup> and concluded that the breach rate 'requires close monitoring'.<sup>42</sup>

### 7.3.4 New Zealand

Research by the Ministry of Justice before the abolition of suspended sentences indicated that 18% of all suspended sentences imposed were activated in full and 6% in part, giving an activation rate of 24%.<sup>43</sup> As in other jurisdictions, however, there is

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<sup>36</sup> Ella Oatham and Frances Simon, 'Are Suspended Sentences Working?' (1972) 21 *New Society* 233, 234. This figure refers to 32% of all suspended sentences imposed, ie, total imprisonment rate.

<sup>37</sup> Anthony Bottoms, 'Limiting Prison Use: Experience in England and Wales' (1987) 26 *Howard Journal of Criminal Justice* 171, 189.

<sup>38</sup> See [2.3.2] for discussion.

<sup>39</sup> George Mair, Noel Cross and Stuart Taylor, *The Use and Impact of the Community Order and Suspended Sentence Order*, Community Sentence Series, Centre for Crime and Justice Studies, London (2007), 25.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*, 29.

<sup>42</sup> *ibid.*, 31.

<sup>43</sup> Wendy Searle, Judy Paulin and Tony Waldegrave, 'The Activation of Suspended Sentences of Imprisonment in New Zealand' in Philip Spier (ed), *Conviction and Sentencing of Offenders in New Zealand 1989 to 1997*, Ministry of Justice, Wellington (1998) Table 9.7. Earlier figures had calculated

little further information on breach rates, with the Ministry of Justice reporting that ‘data on activated sentences are not readily available’.<sup>44</sup>

### 7.3.5 Canada

As discussed elsewhere in this thesis, the Canadian conditional sentence has many features in common with Australian suspended sentences, although the sentence is actually served in the community.<sup>45</sup> Unfortunately, there is little information on breaches of conditional sentences. In 2004, Roberts and Roach wrote that ‘[l]ittle is in fact known about the success rates of conditional sentence orders. The limited research on this question suggests that most orders are in fact completed successfully, but a more comprehensive study needs to be conducted’.<sup>46</sup> A 2006 Parliamentary report stated that ‘no recent national statistics are publicly available on the proportion of orders breached or the nature of the judicial response to breaches’.<sup>47</sup> The report referred to earlier data indicating that 78% of conditional sentences were successfully completed in 1997-1998, but that by 2000-2001, this had fallen to 63%.<sup>48</sup> The increased failure rate was said to be ‘due to the increasing number of conditions placed on offenders, rather than instances of fresh offending’.

There is some limited information available on the activation of breached sentences. In Manitoba, the offender was sentenced to custody for the duration of the sentence in 54% of cases in 1997-98, falling to 49% in 2000-01. In Ontario, by contrast, the figures were 25% and 23% respectively.<sup>49</sup> More recent data published by Canada Statistics indicates that 23% of offenders on a conditional sentence in New Brunswick were admitted to custody because of a breach of condition, compared with 39% of offenders in Saskatchewan, with women in both jurisdictions less likely to be admitted to custody.<sup>50</sup> Data for Alberta indicates that 25% of offenders on conditional sentences breached their sentence, although there was no corresponding

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the activation rate at 20-25%: Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1985 to 1994*, Ministry of Justice, Wellington (1995). For discussion of the use of suspended sentences in New Zealand, see [2.4].

<sup>44</sup> See also Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1992 to 2001*, Ministry of Justice, Wellington (2002), 76. It had also earlier been said that ‘In general, information is not readily available on the number of suspended sentences activated, and the way in which they are activated’: Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996*, Ministry of Justice, Wellington (1997), [7.7].

<sup>45</sup> See [2.5] for a summary of the use of conditional sentences in Canada.

<sup>46</sup> Julian Roberts and Kent Roach, *Community-Based Sentencing: Perspectives of Crime Victims - An Exploratory Study*, Department of Justice, Ottawa (2004), 41.

<sup>47</sup> Robin MacKay, *Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, LS-526E, Parliamentary Information and Research Service, Canada (2006), 14. See also Robin MacKay, *Conditional Sentences*, Report PRB 05-44E, Parliamentary Information and Research Service, Canada (2005), 8.

<sup>48</sup> *ibid*, citing Julian Roberts, ‘The Evolution of Conditional Sentencing in Canada: An Empirical Analysis’ (2002) 3(6th Series) *Criminal Reports* 267, Table 7.

<sup>49</sup> David Paciocco and Julian Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death with a Particular Emphasis on Conditional Sentencing*, Canada Safety Council, Ottawa (2005), Tables 2 and 3.4.

<sup>50</sup> Statistics Canada, ‘Outcomes of Probation and Conditional Sentence Supervision 2003/2004 to 2004/2005’, *The Daily*, 15 December 2006, <http://www.statcan.ca/Daily/English/061215/d061215b.htm>.

information provided about activation rates. It is unfortunately impossible to draw any meaningful conclusions about breaches of conditional sentences in Canada, especially the total imprisonment rate, in the absence of more comprehensive information.

### 7.4 Methodology

The results of the studies discussed above are of some interest but are flawed by their concentration on actioned breaches. My study overcomes this failing by examining all instances where a suspended sentence was breached by the commission of an imprisonable offence and thereby substantially increases the level of understanding about breaches and breach analyses. Details of the information obtained for the quantitative analysis on offenders sentenced in the Supreme Court in 2002-2004 are set out in Chapter 4.<sup>51</sup> The data for the breach study were collected by examining the Tasmania Police database of offenders' criminal records. Data were analysed in SPSS using uni-variate and bi-variate analyses with  $p < 0.05$  as the test for statistical significance.

In this section, I present details of the information obtained for my analysis and discuss some key methodological issues.

#### 7.4.1 Determining the parameters of the dataset

##### 7.4.1.1 Measure of 'breach'

One of the difficulties with breaches of suspended sentence is ascertaining whether the sentence has in fact been breached, especially in cases where the offender is suspended 'on condition of good behaviour' (OCGB). The High Court declared in *Devine*<sup>52</sup> that for behaviour to be a breach of such a condition, it must bear some relationship to the original offence. Accordingly, if an offender commits only one minor unrelated offence during the operational period, this presumably could not be said to be a breach of a condition to be of good behaviour, but what about an offender who commits numerous such offences?<sup>53</sup> And what about a case where an offender is directed, for example, not to commit any further offences of dishonesty, but commits a serious offence not relating to dishonesty?<sup>54</sup>

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<sup>51</sup> See [4.2.2.2].

<sup>52</sup> *Devine v The Queen* (1967) 119 CLR 506. The concept of a good behaviour bond has been criticised for being poorly defined: Richard Fox and Arie Freiberg (eds), *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne (2nd ed, 1999), [7.304]. For discussion, see [3.4.6], (Q18).

<sup>53</sup> By way of example, one offender was sentenced for aggravated burglary and the sentence suspended on condition of good behaviour. During the operational period, he committed 41 'minor' offences, including failure to pay fines, breach of bail and driving whilst disqualified. Arguably such conduct does not amount to being of 'good behaviour' but no breach action was taken against him.

It is relevant to note that the DPP told me in a meeting that he 'wouldn't care' about an offender committing his 50<sup>th</sup> count of 'crossing double white lines' because that's 'not what [a suspended sentence] is designed to deter', conceding however that 'if they were on a driving suspended sentence, of course you would [care]': Meeting with DPP, n 14.

<sup>54</sup> This happened in respect of *IM*, whose sentence was suspended for burglary was wholly suspended on condition that she commit no offences of dishonesty but who was subsequently convicted of assault and failing to appear. No breach action was taken.

In order to clarify the position in respect of conduct which is not specified by the judge as constituting a breach, section 27 provides that an application for breach of a suspended sentence may be taken if ‘it appears to an authorised person that during the period an order suspending a sentence of imprisonment is in force the offender has breached a condition of the suspended sentence or *committed another offence punishable by imprisonment*’.<sup>55</sup> For the purposes of data analysis in this Chapter, a breach will therefore be taken to have occurred where an offender has been convicted of an offence punishable by imprisonment committed during the operational period of the sentence.<sup>56</sup>

### 7.4.1.2 Length of follow-up period

Whereas two years is a fairly standard follow-up period for reconviction studies,<sup>57</sup> there is no similar convention in respect of breach analyses. The SAC in its analysis considered the fact that operational periods in the Supreme Court have a maximum duration of three years and, taking into account data on court completion times, assumed ‘that a five-year lag period from the time the suspended sentence was handed down will capture almost all suspended sentences breached and the sentencing outcomes attached’.<sup>58</sup>

In my study, I examined all convictions entered by 1 January 2007 for suspended sentences imposed between 1 July 2002 and 30 June 2004, giving a follow-up period of between 2½ and 4½ years.<sup>59</sup> In light of the information I present below on the time taken to prosecute breaches, this appears to be too short a follow-up period. In particular, there were 18 offenders whose operational period had not yet expired by 1 January 2007, and a further 16 offenders whose operational period had only expired in the previous six months. It is therefore probable that more offenders would have

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<sup>55</sup> Emphasis added. Although conviction for an imprisonable offence *prima facie* constitutes a breach of the suspended sentence, there clearly remains an executive discretion whether to take breach action, as well as a judicial discretion whether to activate the breached sentence. I discuss the exercise of these discretions further below.

<sup>56</sup> This is also the test for breach used in Victoria: *Sentencing Act 1991* (Vic), s 31(1). The Court of Appeal held in *Coleman v DPP* (Vic) (2002) 5 VR 393, 394-5 that the test for the court is whether the offence is ‘liable to be, or capable of being, visited with punishment by imprisonment’, rather than whether the offender will in fact be sentenced to a term of imprisonment as a result of that offence, and specifically ‘whether the particular offence actually committed [by the offender is] able to be visited with imprisonment’ (Batt JA). In using this as the measure of ‘breach’, the SAC recognised that there ‘is no requirement that the subsequent offence be of the same kind as the original offence for which the offender was sentenced’, with the result that an offender who receives a suspended sentence for a serious offence ‘risks having his or her original prison sentence activated if he or she commits a relatively minor and/or unrelated offence’: SAC DP, n 4, fn 190.

Note that there were 28 offenders who were convicted of non-imprisonable offences committed during the operational period of their sentence. Of these, 25 had their sentence suspended OCGB. Most of these offenders committed only one (n=12) or two offences during the operational period (n=6) and the offences were primarily traffic offences, for example, speeding or driving an unregistered vehicle. Arguably, conduct of this nature should not be regarded as a breach of the condition to be of good behaviour.

<sup>57</sup> See [6.3.2.1] for discussion.

<sup>58</sup> SAC DP, n 4, [4.63].

<sup>59</sup> This time frame was chosen because I wanted to use the same dataset as for my initial analysis of sentences as examined in Chapters 4 and 5 and did not want that information to be too stale.

been found to have breached their sentence if a longer follow-up period had applied<sup>60</sup> and accordingly, these findings may give an under-representation of the true rate of offending during the operational period of the suspended sentence, as well as possibly an under-count of breach action. It is therefore desirable that future analyses allow for a longer follow-up period. Nevertheless, in the present study, the problems associated with too short a follow-up period would appear to be ameliorated to some extent by the fact that I examine all convictions during the operational period, not just those few resulting in prosecution action. Finally, from the information available in the cases actioned in 2002-2004, I am able to estimate the follow-up period which would be required in any future breach study to capture all relevant instances of breach and the judicial response to such breaches.

#### 7.4.2 Dataset

As discussed in Chapter 4, there were 246 wholly suspended and 105 partly suspended sentences imposed by the Supreme Court in 2002-2004. Offender details in the 2002-2004 dataset were saved in a separate database and supplemented by the following information for the 229 offenders with a wholly suspended sentence and 81 offenders on a partly suspended sentence in the breach study:

*Table 7-1: Data fields for breach analysis*

Data field	Details and comments
Offence committed <sup>61</sup>	Yes/no
Imprisonable offence committed	Yes/no
Whether offence committed an express breach of the conditions of sentence	Yes/no
Most serious offence committed	None, minor, moderate, serious
Number of offences committed	Eg 5 and 3-5
Type and number of offences committed	Eg 3 serious; 31 moderate; 12 minor
Date of offence for which suspended sentence imposed	Eg 11 Oct 2000
Date of first offence committed	
Date of conviction for first offence	
Breach action taken	Yes/no
Date of breach action	
Judicial action taken on breach	Eg sentence partly activated
Comments	Text field for case details and comments

#### 7.4.3 Actioned cases

Only seven of the 126 offenders in breach of their sentence had had breach action taken against them as at 1 January 2007. I discuss these seven cases, hereafter referred to as ‘actioned cases’, in further detail below. It is relevant to note that only four of these cases had COPS entered in TasinLaw. For the remaining three cases,

<sup>60</sup> I noted for example one case where the offender, who received a suspended sentence for burglary, had by 1 January 2007 only been convicted of minor traffic offences. In February 2007, he was convicted of a further 17 offences committed during the operational period, including nine counts of stealing.

<sup>61</sup> The details gathered relate only to offences committed during the operational period.



the Supreme Court files contained only details about whether the sentence was activated, not the circumstances of the breach or the reasons for the judicial action taken.

Because there were so few actioned cases, however, I decided to also examine the 15 breach cases dealt with in the Supreme Court between 30 June 2002 and 1 July 2004. For the purposes of clarity, I will refer to these cases as ‘cases actioned in 2002-2004’. There were COPS on the TasinLaw database for 12 of these cases and I was provided with the comments for the remaining three cases by the Supreme Court.

## 7.5 Discussion of findings

In this section, I present quantitative information on breaches of partly and wholly suspended sentences. I also present qualitative information about some of the cases where breaches occurred and the judicial responses to breaches in the small number of cases where breach action was taken.

### 7.5.1 Breach rates and actioned cases

*Fig 7.1: Breach rates and actioned cases*

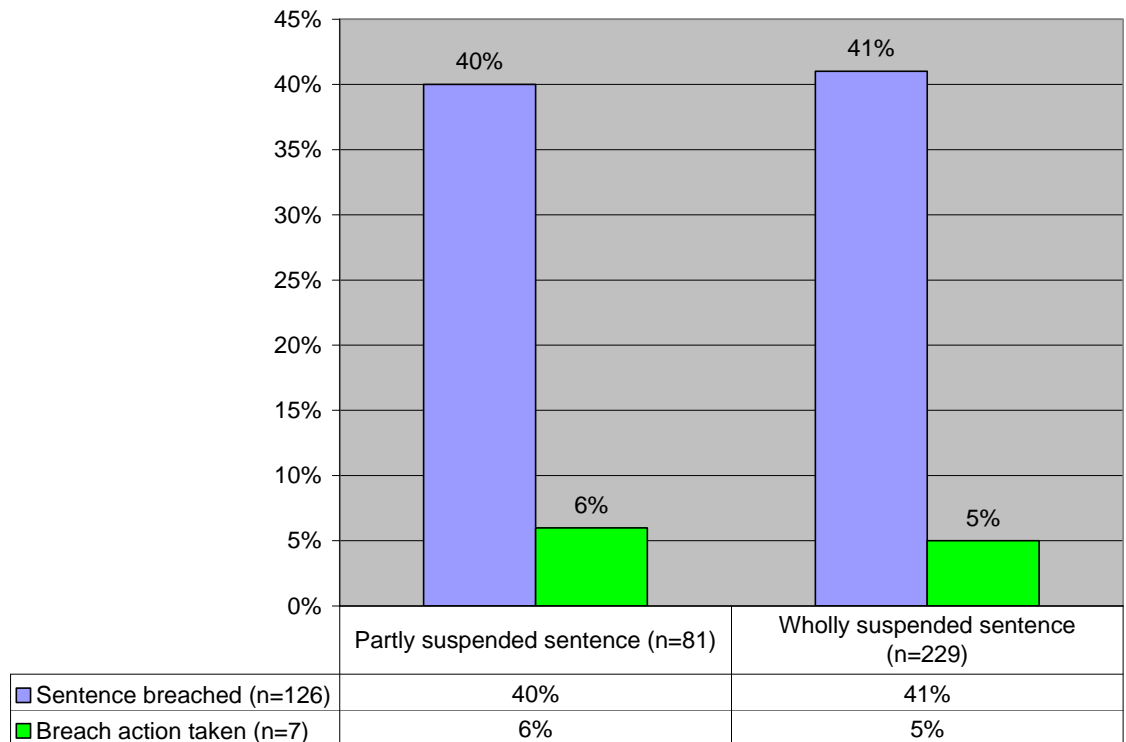


Figure 7.1 sets out the breach rates and proportion of actioned cases for partly and wholly suspended sentences.<sup>62</sup> As at 1 January 2007, 40% of offenders on a partly suspended sentence and 41% of offenders on a wholly suspended sentence had breached their sentence. In other words, of 81 offenders in receipt of a partly suspended sentences, 32 committed one or more offences punishable by imprisonment during the operational period of their sentence. Wholly suspended

<sup>62</sup> There was no statistically significant difference between the two sentence types in terms breach rates or breach action taken.

sentences were imposed on 229 offenders, of whom 94 committed imprisonable offences during the operational period. This is broadly comparable with the recent Victorian data, which indicated a breach rate of 36% in the higher courts.<sup>63</sup>

Somewhat astonishingly, however, breach action was taken in respect of only seven offenders: two on a partly suspended and five on a wholly suspended sentence, meaning that only 6% and 5% respectively of offenders in breach were brought back to court for breach action. Of the seven actioned cases, the sentence was partly or wholly activated in only two out of the five wholly suspended sentences and was activated in both partly suspended sentences. The operational period was extended or the original term resuspended in the remaining three cases.<sup>64</sup> The activation rate overall was therefore only 3% and the total imprisonment rate – that is, the proportion of offenders in receipt of a suspended sentence who were ultimately required to serve time in custody – was a mere 1%. Keeping offenders out of prison and reducing the size of the prison population are of course key arguments in favour of suspended sentences.<sup>65</sup> The analysis in Chapter 6 demonstrates lower reconviction rates for suspended sentences than for other sentencing dispositions,<sup>66</sup> suggesting that they may be an effective deterrent or rehabilitative sentencing option for some offenders. Nevertheless, a failure to deal appropriately with breached sentences not only reduces the effectiveness of the sentence for offenders, who may be encouraged to continue offending in the absence of breach action, but potentially also contributes to the negative perception of suspended sentences and may thereby undermine the criminal justice system generally. The TLRI has described my findings as ‘startling’, adding that while ‘failure to initiate breach proceedings is not an inherent flaw of the suspended sentence, such a failure merely fuels the public perception that such sentences are an ineffectual slap on the wrist and contributes to a lack of confidence in sentencing’.<sup>67</sup>

### 7.5.2 Offence seriousness

Figure 7.2 sets out the most serious offence committed by offenders in breach during the operational period.<sup>68</sup> Partly suspended sentences performed worse than wholly suspended sentences, with 41% of offenders in breach of a partly suspended sentence committing a serious offence, compared with 31% on a wholly suspended sentence. Offenders on a wholly suspended sentence, by contrast, were most likely to commit only minor offences (44% vs 37%).

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<sup>63</sup> SAC DP, n 4, [4.64].

<sup>64</sup> Resuspending the sentence or extending the operational period effectively gives rise to the same outcome, namely, the continuation of the suspended sentence for a specified period.

<sup>65</sup> See [1.4.4] and [1.4.5] for discussion.

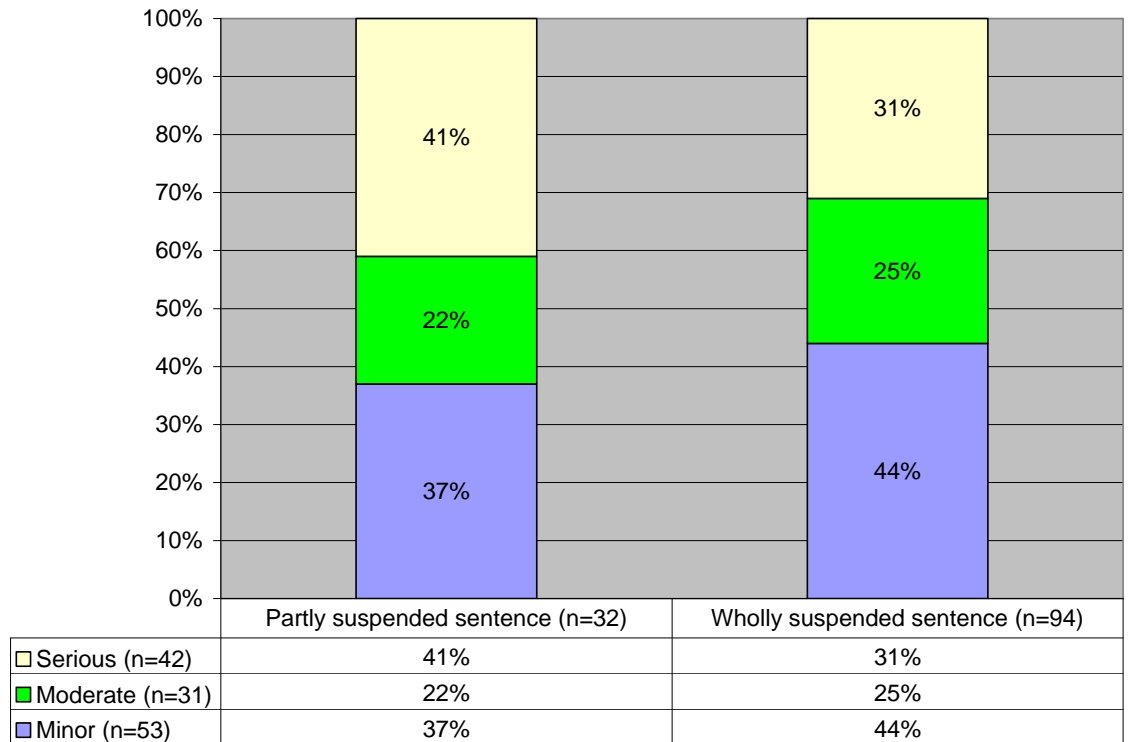
<sup>66</sup> See [6.4.3.1].

<sup>67</sup> TLRI, n 6, 23.

<sup>68</sup> See **Table 4-2** for discussion of what are ‘minor’, ‘moderate’ and ‘serious’ offences. There was no statistically significant difference in offence seriousness between partly and wholly suspended sentences.

## 7. Breach analysis

*Fig 7.2: Most serious offence committed in breach during the operational period*



Even if one can readily imagine that the prosecutorial discretion should be exercised against taking breach action in respect of some minor, albeit imprisonable, offences (n=51), the same could surely not be said of those offenders who committed moderate (n=31) or serious (n=42) offences during the operational period of their suspended sentence. Fortunately, it would seem that in the few instances where breach action is taken, this is at least not done in respect of minor offences. Of the seven actioned cases, five involved the commission of a serious offence and two involved moderate offences during the operational period. There were, however, numerous cases of equal or more serious offending where no breach action was taken, pointing to a somewhat arbitrary approach to the investigative process and the exercise of the discretion to initiate breach proceedings.<sup>69</sup>

ZT was sentenced for assault, partly suspended OCGB. He was convicted of 20 offences committed during the operational period, including aggravated burglary, assaulting a police officer, sexual intercourse with a person under the age of 17 and driving with a prescribed content of alcohol. Once again, no breach action was taken in respect of the suspended sentence, although he did receive unsuspended sentences for some of the later offending. The imposition of an unsuspended sentence following a breached sentence may be some means of ensuring the consequences of breaching are brought home to an offender, but I would argue that it is nevertheless important, in order to maintain the integrity and credibility of suspended sentences that the breached sentence also be brought back before the court. In ZS, the offender was sentenced for burglary, stealing and unlawful fire-setting and the sentence partly

<sup>69</sup> Breach action was taken in 7% of cases where the offender committed a moderate offence during the operational period of the sentence, compared with 12% for serious offences.

suspended on condition that he commit no crimes involving damage to property or fires. During the 18 month operational period, he committed 44 offences, of which 32 were serious and 11 were moderate, including numerous counts of burglary and stealing. Although none of the offences were in breach of the express condition of suspension, they were certainly imprisonable offences which enlivened the DPP's discretion to initiate action. The offender received unsuspended sentences for some of his later offending but no breach action was taken in respect of the suspended sentence. Somewhat ironically, he received a further partly suspended sentence for a burglary committed in breach of the index sentence. He then proceeded to breach that sentence with yet another burglary, for which he received a wholly suspended sentence. This case also highlights the incidence of offenders receiving numerous cumulative suspended sentences. In Chapter 3, several sentencers indicated that they would generally be reluctant to give a suspended sentence to an offender who had previously received and/or breached such a sentence. Notwithstanding this assertion, in one case, an offender subject to a wholly suspended sentence for aggravated burglary committed 23 offences in breach of his sentence, six of which were serious and included two further counts of aggravated burglary. Not only was breach action not taken, but he subsequently received another three wholly suspended sentences. Another offender was sentenced for the offence of cultivating a plant for sale, with the sentence wholly suspended on condition of good behaviour and that he commit no offences 'involving the trafficking, sale or supply of drugs or an intention to do so'. He was later convicted of five counts of using, possessing and cultivating drugs, and received a further wholly suspended sentence on condition that he be of good behaviour and not commit any offences against the *Misuse of Drugs Act 1995*. Decisions of this nature beg the question of whether the sentencing judge is fully apprised of the offender's previous convictions and sentences and the circumstances in which any earlier suspended sentences were imposed.

### 7.5.3 Frequency of offending

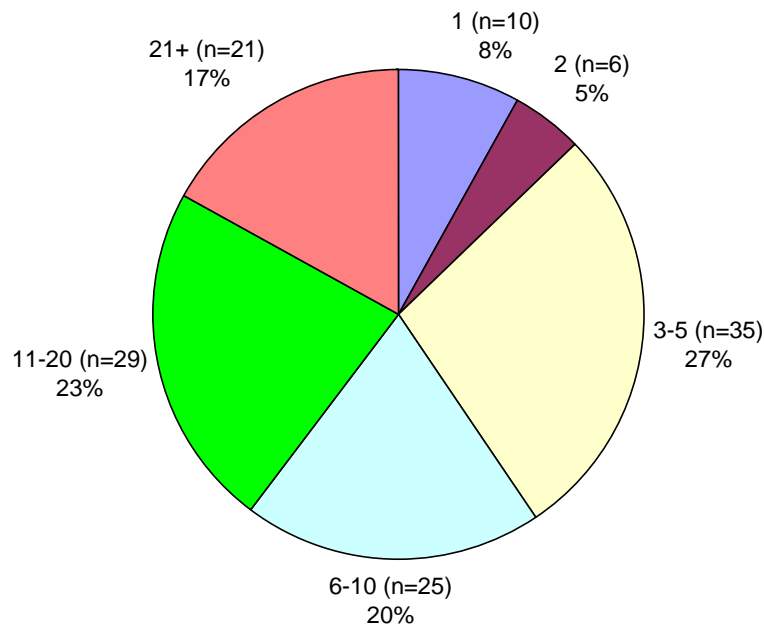
Figure 7.3 demonstrates that only a small proportion of offenders in breach committed one (8%) or two (5%) offences. Almost a quarter (23%) committed between three and five offences and another 20% committed between six and 10 offences. A significant proportion committed 11-20 (23%) or 21 or more (17%) offences during the operational period of their sentence.

Perhaps surprisingly, only one of the seven actioned cases involved an offender who had committed over 20 offences, with breach action taken against an offender who had committed 32 offences, including aggravated burglary and stealing, although the suspended sentence was ultimately continued with an extended operational period. No breach action was taken against the five most prolific offenders, who committed between 44 and 83 offences. One offender received a wholly suspended sentence on condition that he be of good behaviour and commit no offence of dishonesty. Although most of his offending was minor in nature, namely, 71 traffic offences and failure to pay fines, as well as one count of stealing, it is desirable that such an offender be brought back before court to determine the appropriate course of action. In fact, failure to do so may encourage offenders to perceive a suspended sentence as a slap on the wrist. This may in turn promote further offending, in the belief that

## 7. Breach analysis

breach action will not be pursued.<sup>70</sup> On the other hand, offenders in the seven actioned cases did commit more offences than offenders in breach overall,<sup>71</sup> suggesting that more prolific offenders may face a somewhat greater chance of being brought back before court for breach proceedings than those committing fewer offences.

*Fig 7.3: Number of offences committed during the operational period*



### 7.5.4 Examination by key sentencing variables

#### 7.5.4.1 Offence type

Table 7-2 sets out breach rates by offence type<sup>72</sup> for partly and wholly suspended sentences. The differences in breach rates were statistically significant for wholly suspended sentences,<sup>73</sup> but the small numbers of partly suspended sentences for all offence types other than violence and property means no meaningful statistical analysis can be undertaken. For wholly suspended sentences, sentences imposed for robbery were most likely (73%) and for sexual offences least likely (15%) to be breached. For partly suspended sentences, by contrast, ‘other’ offences were least likely to be breached (25%), while violence offences were most likely to be breached (43%).

<sup>70</sup> It is in this context interesting to note the recent findings of the SAC that defendants charged with a single breach offence were more likely to have their sentence activated than those with multiple breach offences: SAC DP, n4, [4.90]-[4.91].

<sup>71</sup> The mean number of offences committed by the 126 offenders in breach during the operational period was 12.2, compared with a mean of 14.4 for the seven offenders sentenced for breach. The median figures were 7 and 13 respectively.

<sup>72</sup> See Appendix G for description of how these offence types correlate with ASOC divisions.

<sup>73</sup>  $\chi^2=11.354$ ,  $df=5$ ,  $p<0.05$ .

## 7. Breach analysis

The findings for wholly suspended sentences accord with recent Canadian data indicating that breach rates were highest for robbery and burglary offences and lowest for sexual assault, drug and traffic offences.<sup>74</sup> The data most recently analysed by the SAC also indicates that a suspended sentence imposed in the higher courts for armed robbery was most likely to be breached, while sexual offences had low breach rates.<sup>75</sup> The SAC had earlier found that breach rates were highest for property offences (57%) and lowest for drug offences (11%).<sup>76</sup> In Tait's study, the offence types most likely to result in breach were possessing a drug of dependence or breach of a community based order (both 29%), while drink driving was least likely to be breached (4%).<sup>77</sup>

*Table 7-2: Breach rates by offence type*

Offence type	Proportion breached	
	Partly suspended sentence (n=81)	Wholly suspended sentence (n=229)
Violence (n=77)	43% (n=21)	41% (n=56)
Sexual assault (n=16)	33% (n=3)	15% (n=13)
Robbery (n=20)	40% (n=5)	73% (n=15)
Property (n=117)	42% (n=38)	43% (n=79)
Drugs (n=32)	33% (n=6)	42% (n=26)
Other (n=48)	25% (n=8)	33% (n=40)

### 7.5.4.2 Prior record

Unsurprisingly, there were significant differences in breach rates on the basis of the offender's prior criminal record.<sup>78</sup> As set out in Table 7-3, an offender with a significant prior record was more than four times more likely to breach their partly suspended sentence than a first offender (82% vs 19%). Although the differences were still statistically significant for wholly suspended sentences,<sup>79</sup> offenders with a minor record were in fact slightly more likely to breach than those with a significant record (55% vs 52%).<sup>80</sup> First offenders for both types of sentence were least likely to breach. These findings generally conform with those of Oatham and Simon, who found prior offending strongly associated with breach: 11% of male first offenders breached, compared with 71% for men with five or more previous convictions.<sup>81</sup>

<sup>74</sup> Statistics Canada, n 50, using data for Alberta.

<sup>75</sup> Turner, n 25, Tables 7 and 8.

<sup>76</sup> SAC DP, n 4, [4.67].

<sup>77</sup> Tait, n 24, 154.

<sup>78</sup>  $\chi^2=18.817$ ,  $df=2$ ,  $p<0.001$ . See [6.4.3.3] for discussion of the relevance of prior record to reconviction generally.

<sup>79</sup>  $\chi^2=15.312$ ,  $df=2$ ,  $p<0.001$ .

<sup>80</sup> Somewhat unexpectedly, only two of the offenders against whom breach action was taken had significant prior records. Two had no prior record, a further two had a minor record and there was no information provided in respect of one offender.

<sup>81</sup> Oatham Simon, n 36, 234.

*Table 7-3: Breach rates by prior record*

<b>Prior record</b>	<b>Proportion breached</b>	
	Partly suspended sentence (n=78)	Wholly suspended sentence (n=221)
Nil (n=130)	19% (n=32)	28% (n=116)
Minor (n=80)	38% (n=29)	55% (n=80)
Significant (n=52)	82% (n=17)	52% (n=25)

**7.5.4.3 Age**

As can be seen in Table 7-4, offenders were less likely to breach their suspended sentence, the older they were at the time of the index sentence. Over half of 18-24-year-olds (55%) on a wholly suspended sentence breached, compared with only 17% of offenders aged 45 and over and 48% of offenders on a partly suspended sentence aged 18-34 breached, compared with no offenders aged 45 and over. The mean age for offenders who breached their sentence was 27, with a median of 23, compared with 33 and 30 respectively for those not in breach. These findings conform with findings from the NSW Judicial Commission that the median age of offenders who successfully completed their sentence was higher than those whose sentence was breached and revoked.<sup>82</sup> Desistance from crime appears to be a function of age<sup>83</sup> and accordingly, this result should therefore not be taken as meaning that suspended sentences are an inappropriate sentencing disposition for young offenders.

*Table 7-4: Breach rates by age*

<b>Age of offender</b>	<b>Proportion breached</b>	
	Partly suspended sentence (n=79)	Wholly suspended sentence (n=225)
18-24 (n=130)	48% (n=29)	55% (n=101)
25-34 (n=80)	48% (n=23)	37% (n=57)
35-44 (n=52)	29% (n=21)	32% (n=31)
45-54 (n=32)	0% (n=2)	17% (n=30)
55+ (n=10)	0% (n=4)	17% (n=6)

**7.5.4.4 Gender**

Table 7-5 sets out breach rates for partly and wholly suspended sentences by gender. Men were slightly more likely to breach, at 41%, compared with 38% for women, but this difference was not statistically significant.<sup>84</sup> Men were more likely to breach partly rather than wholly suspended sentences (44% vs 40%), while women, somewhat unusually, were much more likely to breach wholly rather than partly suspended sentences (44% vs 20%).<sup>85</sup> Although the numbers are clearly too small to

<sup>82</sup> Potas, Eyland and Munro, n 34. The SAC also recently found that offenders aged under 25 were more likely to breach their sentence than those aged 25 and over: Turner, n 25, Fig 24.

<sup>83</sup> See discussion in [6.4.3.4].

<sup>84</sup> Note findings by the SAC that women were overrepresented on breach in the higher courts but equally represented in the Magistrates' Court: SAC DP, n 4, [4.68]; [4.82]. More recent findings by the SAC indicate higher breach rates for men in the Magistrates' Court and lower rates in the higher courts: Turner, n 25, Fig 22.

<sup>85</sup> A possible explanation for this finding is difference in prior record – 67% of women on a partly suspended sentence had no prior record, compared with only 50% of women on a wholly suspended sentence.

infer that women are less likely to have breach action taken against them, only one of the actioned cases involved a female offender.<sup>86</sup>

*Table 7-5: Breach rates by gender*

Gender	Proportion breached	
	Partly suspended sentence (n=81)	Wholly suspended sentence (n=229)
Male (n=252)	44% (n=66)	40% (n=186)
Female (n=58)	20% (n=15)	44% (n=43)

#### 7.5.4.5 Sentence length

*Table 7-6: Breach rates by sentence length*

Sentence length	Proportion breached	
	Partly suspended sentence (n=81)	Wholly suspended sentence (n=229)
0>6 months (n=121)	22% (n=9)	42% (n=112)
6>12 months (n=105)	68% (n=22)	42% (n=83)
12>18 months (n=54)	26% (n=23)	37% (n=27)
18-24 months (n=30)	33% (n=27)	29% (n=7)

There was no statistically significant difference in breach rates on the basis of sentence length for wholly suspended sentences, but there was for partly suspended sentences,<sup>87</sup> with sentences of six to less than 12 months particularly likely to be breached. Interestingly, the longest wholly suspended sentences imposed were least likely to be breached, at only 29%, compared with 42% for sentences of up to 12 months. These findings are broadly comparable with Tait's, who found that offenders on a sentence of more than nine but less than 12 months were most likely to breach (29%), compared with only 16% of sentences of less than three months.<sup>88</sup> The SAC also recently found that in the higher courts, there was 'a negative relationship between the length of the imprisonment term suspended and the breach rate: the longer the imprisonment term suspended, the lower the breach rate and the less likely it is that a breach will occur',<sup>89</sup> although there was no such nexus for sentences in the Magistrates' Courts.<sup>90</sup>

#### 7.5.4.6 Length of operational period

In Tait's study, the length of the operational period was the most significant factor on breach, with logic dictating that 'the longer the period, the longer the person is at risk of breaching a suspended sentence'.<sup>91</sup> The SAC also recently found a positive relationship between the length of the operational period and the likelihood of

<sup>86</sup> Note data from the SAC indicates that in the Victorian Supreme Court, women were more likely than men to have their sentence activated but the reverse was the case in the Magistrates' Court: SAC DP, n 4, [4.80]; [4.89]. Recent Canadian research found that women were less likely than men to be admitted to custody following a breach of conditional sentence: Statistics Canada, n 50.

<sup>87</sup>  $\chi^2=10.858$ ,  $df=3$ ,  $p<0.05$ .

<sup>88</sup> Tait, n 24, 155.

<sup>89</sup> SAC DP, n 4, [4.71].

<sup>90</sup> *ibid*, [4.84].

<sup>91</sup> Tait, n 24, 155.



breach.<sup>92</sup> In fact, in the higher courts, suspended sentences with operational periods of more than 18 months had breach rates of over 40%, compared with breach rates of less than 10% for sentences with operational periods of 18 months or less.<sup>93</sup> Early research by Oatham and Simon, by contrast, found that breaches were most likely to occur early in the operational period, suggesting that reducing the maximum operational period would have little effect on breach rates.<sup>94</sup> Furthermore, research by the NSW Judicial Commission on supervised suspended sentences found no correlation between length of supervision and completion success.<sup>95</sup>

In the present study, 61% of all operational periods were set at exactly two years, so I compared sentences with an operational period of this length with those where it was set at either less than or more than two years. The data presented in Table 7-7 demonstrate that sentences with an operational period of less than two years are most likely to be breached, while an operational period of exactly two years is least likely to be breached. However these differences were only statistically significant for wholly suspended sentences.<sup>96</sup>

*Table 7-7: Breach rates by length of operational period*

<b>Length of operational period</b>	<b>Proportion breached</b>	
	Partly suspended sentence (n=81)	Wholly suspended sentence (n=229)
< 2 years (n=54)	47% (n=15)	59% (n=39)
2 years (n=188)	38% (n=53)	34% (n=135)
> 2 years (n=68)	39% (n=13)	46% (n=55)

Logic would also seem to dictate that the longer the period at risk, the more offences one might commit. There was however no clear relationship between length of operational period and the number of offences committed, as Table 7-8 demonstrates. The median number of offences committed decreased as the operational period increased, while the mean number of offences was highest for sentences with the shortest operational period and lowest for sentences with an operational period of exactly two years.

*Table 7-8: Number of offences committed by length of operational period*

<b>Length of operational period</b>	<b>Mean</b>	<b>Median</b>
< 2 years (n=32)	15.8	9
2 years (n=87)	8.5	5
> 2 years (n=35)	10.3	6

<sup>92</sup> SAC DP, n 4, [4.74].

<sup>93</sup> *ibid*, [4.76]. In the Magistrates' Court, by contrast, the length of the operational period did not appear to influence breach rates: [4.86].

<sup>94</sup> Oatham and Simon, n 36.

<sup>95</sup> Potas, Eyland and Munro, n 34.

<sup>96</sup>  $\chi^2=8.334$ ,  $df=2$ ,  $p<0.05$ .

### 7.5.5 Analysis of relevant time periods

#### 7.5.5.1 Time to re-offend

In order to further examine the relevance of the length of time at risk to offending, I examined how long it takes for an offender to commit their first offence after the imposition of the sentence (for wholly suspended sentences) or release from custody (for partly suspended sentences).<sup>97</sup> As Table 7-9 demonstrates, offenders on a wholly suspended sentence had a broader range in their offending period than those on a partly suspended sentence. For both groups, the mean period at risk before committing their first offence was about seven months, with a median period of about five months, thereby suggesting any changes to maximum operational periods will have little impact on re-offending patterns.<sup>98</sup>

*Table 7-9: Time at risk until first offence*

	<b>Partly suspended sentence (n=37)</b>	<b>Wholly suspended sentence (n=115)</b>
Range	32 – 573 days	4 – 953 days
Median	169 days	152 days
Mean	203 days	236 days

#### 7.5.5.2 Time to be reconvicted

Another interesting factor is the time it takes for the first offence the offender commits on the suspended sentence to result in a conviction, as this may be the first time that the offender is forced to deal with the consequences of their conduct. Theoretically at least, this will often also signal the first opportunity for the prosecuting authorities to initiate breach proceedings. For reasons which are not clear on the data presented in Table 7-10, offenders on a wholly suspended sentence not only had a broader range, but also experienced longer delays to conviction. On average, offenders on a partly suspended sentence were reconvicted for the first offence committed after their release from custody after six months, whereas for offenders on a wholly suspended sentence it took about nine months to be convicted for the first offence committed on the suspended sentence.

*Table 7-10: Time from first offence to conviction for that offence*

	<b>Partly suspended sentence (n=37)</b>	<b>Wholly suspended sentence (n=113)</b>
Range	23 – 630 days	22 – 1147 days
Median	192 days	240 days
Mean	186 days	261 days

Table 7-11 sets out the time between becoming at risk of re-offending and the date of conviction for the first offence committed while at risk. Offenders on a partly suspended sentence who committed further offences were generally convicted within 13 months of their release from custody (a mean of 389 days), while offenders on a

<sup>97</sup> Not all first offences committed would have been imprisonable ones which could have been regarded as a breach of sentence, a detail which became apparent only after all the data had been gathered. Any future research should therefore record the date of the commission of the first imprisonable offence.

<sup>98</sup> In one case, however, the offender first offended after more than two years and seven months on a suspended sentence with an operational period of three years. It is likely that if his operational period had been two years, he would not have breached the sentence at all.

wholly suspended sentence took over 16 months to be convicted (500 days). In the absence of rigorous prosecution of breaches of a suspended sentence, such delays may encourage offenders in thinking that there will be no adverse consequences from their continued offending while on a suspended sentence.

*Table 7-11: Time at risk until conviction for the first offence*

	<b>Partly suspended sentence (n=37)</b>	<b>Wholly suspended sentence (n=113)</b>
Range	110 – 854 days	56 – 1373 days
Median	369 days	412 days
Mean	389 days	500 days

### 7.5.5.3 Time for breach action to be taken

I analysed the seven actioned cases in order to ascertain the time it took from when the offender was convicted for the first offence committed while on the suspended sentence until the breach proceedings were heard. This analysis demonstrates that it took between 41 and 1,148 days after conviction for the first offence committed during the operational period for the breach to be heard, with a mean of 334 days and median of 197 days. In other words, although it was possible for breach proceedings to be heard expeditiously (41 days), it took almost a year on average after the conviction for the first offence was entered for the matter to be brought back to court.<sup>99</sup> Although deterrence research generally focuses on certainty and severity, the celerity of punishment is also a key issue. Clearly lengthy delays will only reinforce a perception that a suspended sentence is a mere slap on the wrist and enable an offender to continue to offend with impunity.<sup>100</sup>

*Table 7-12: Time from imposition of suspended sentence to breach action*

	<b>Actioned cases (n=7)</b>	<b>Cases actioned in 2002-2004 (n=15)</b>
Range	439 – 1536 days	299 – 1618 days
Median	1076 days	919 days
Mean	976 days	925 days

Table 7-12 sets out the overall period from the time the suspended sentence was imposed until breach action was taken in respect of both the seven actioned cases and the 15 cases actioned in 2002-2004. As can be seen, of the 22 cases examined, the shortest delay from the imposition of the suspended sentence to the finalisation of breach proceedings was less than one year (299 days) and the longest delay was just under 4½ years (1618 days), with a mean and median delay of under three years. These data suggest for any future analysis that a follow-up period of five years (1825 days), as was adopted by the SAC in its study, would certainly capture all instances of offending in breach of the suspended sentence and judicial action in respect of such breaches.

<sup>99</sup> As set out above, some of these convictions were not imprisonable and therefore may not have enlivened the power to initiate breach action. Further research is required to determine the time to breach proceedings for imprisonable offences. This finding also conflicts with the suggestion by the DPP that breach proceedings are heard ‘in reasonably quick time’ from the time the conviction is entered. This issue is discussed further in [7.5.5.3].

<sup>100</sup> See [1.4.2] for discussion of deterrence research.

## 7.6 Principles on breach

### 7.6.1 Existing case law

In Chapter 2, the Australian case law and legislative provisions on breach are considered. Warner has remarked about Tasmania that '[n]o statutory guidance is given as to the matters relevant to the exercise of the discretionary powers in proceedings for breach and there appears to be little in the way of established principles relating to their exercise.'<sup>101</sup> In Chapter 3, two magistrates thought that the existing authorities created a presumption that a breach suspended sentence should be activated, but a careful examination of all Supreme Court judgments since the Act was introduced indicates that there has in fact been very little case law dealing with the principles on breach of a suspended sentence.<sup>102</sup>

Warner suggests that 'conditions are interpreted strictly' by the court,<sup>103</sup> that is, in favour of the offender. In *Willox v Warren*,<sup>104</sup> the offender had been convicted of stealing but Cox J held that the condition of his suspended sentence that he commit 'no similar offence for a period of two years', was not breached by motor vehicle theft under the *Police Offences Act 1935*. He suggested that 'the likeness between two offences must be sufficiently marked to constitute the two being of a "like nature or kind"', adding that:

Although there is some likeness to be found in the two offences, notably in that both involve interference with the property of others with guilty knowledge of lack of authority, that in my view is not sufficiently marked to constitute the two of a like nature or kind. There are many crimes of violence, but the co-existence of the fact of violence does not make the crime of assault a 'similar' crime to that of murder for example.<sup>105</sup>

<sup>101</sup> Kate Warner, *Sentencing in Tasmania*, Federation Press, Sydney (2nd ed, 2002), [9.212]. See [2.2.5] for discussion of breach principles in other Australian jurisdictions.

<sup>102</sup> Cf *Hazell v Brown & Smith* [1999] TASSC 46, where Cox CJ heard a Notice to Review a substituted sentence for breach of suspended sentence and *Kay v Hickey* [2002] TASSC 108, which dealt with a breach of a Commonwealth recognizance release order. Note also *R v Meers and Moles* (1998) 101 A Crim R 329, where it was stated that contrition and good prior conduct 'are indicia of the fact that the offence in question is out of character. A breach of the condition of good behaviour upon which the execution of a sentence is normally suspended is prima facie evidence that this is not the case and such a breach may warrant the activation of the initial sentence, not by way of punishment for the wrongful conduct which constitutes the breach, but by way of meting out to the offender the just deserts of his conduct on the earlier occasion having regard to his true character'.

<sup>103</sup> Warner, n 101, [9.211].

<sup>104</sup> *Willox v Warren* (Unreported, Tas SC, Cox J, 18 March 1987). See also *R v Breen* [1963] Tas SR 182 (NC 2), where the condition that the offender not commit any crime or offence involving personal violence was deemed not to have been breached by an assault where the offender threw the contents of a glass at another once it was proven that striking the victim from not intentional.

<sup>105</sup> Interestingly, Cox J went on to state: 'In the instant case the learned magistrate imposing the original sentence required that the applicant commit no offence similar to that of stealing and imposed a probation order, one of the conditions of which was that he should be of good behaviour. The applicant's breach of s 37B of the *Police Offences Act 1935* was evidence of a failure to be of good behaviour which could have been made the subject of a complaint under the *Probation of Offenders Act 1973*, s 9, but it was not in my view a breach of the condition upon which the execution of the sentence was suspended'. On one view, it would therefore seem that commission of the offence of motor vehicle theft would be regarded as a breach of the condition to be of good behaviour, whether for a probation order or a suspended sentence. In any event, it appears from the cases considered

Clearly the issue of ‘what is a breach?’ is overcome if one takes the commission of an imprisonable offence as evidence of breach, as this study has done. As to the factors which are to be considered in breach proceedings, it is important to consider the judgment of Neasey J in *Greaves v Smith*.<sup>106</sup> Although the judgment related to proceedings under section 74C of the *Justices Act 1959* (Tas), these principles would appear to apply in respect of breach applications under the Act.<sup>107</sup> Neasey J stated:

The scheme set up under s74C requires the court when the breach has been proved to consider the question of penalty for the original offence, in the light of the circumstances of that offence and of the offender, of the sentence then imposed, and in the light of all relevant matters which have occurred since. Such relevant matters usually include the nature of the breach and the gravity of it, but only as matters incidental to the overall question of penalty for the original offence. The objective of the suspended sentence option is reformatory as well as penal, and the matters which need to be weighed when breach of suspended sentence has been proved require a careful exercise of judgment.

Another issue to be considered on the breach hearing is the relevance of any sentence imposed for the offence constituting the breach. According to Zeeman J in *Davies v Dillon*,<sup>108</sup> the Court’s discretion on ‘an application to activate a suspended sentence appears to be wide enough to enable the Court to take into account the sentence imposed for another offence, the commission of which constitutes the breach’.<sup>109</sup> As noted above, the TLRI has proposed introducing a statutory presumption in favour of activation, a measure which would significantly constrain the breadth of the Court’s discretion in breach proceedings.

### 7.6.2 Analysis of actioned cases

This section examines both the seven actioned cases and the 15 cases which were actioned in 2002-2004, in order to further develop an understanding of the principles which currently appear to operate in respect of breach proceedings. There are clearly too few cases to attempt any kind of quantitative analysis, but the small number of cases means it is possible to discuss them in detail. It is important to note that the information on the seven actioned cases comes from my examination of the offenders’ criminal records. In order to comply with ethics requirements to avoid identifying an offender, which are referred to by coded initials, I provide only minimal details about the case. The 15 cases actioned in 2002-2004, by contrast, involve an examination of the COPS, which are a matter of public record. Accordingly, these cases will yield a richer source of information for analysis, as I will be able to present more of the judicial reasoning in each case.

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below that the Supreme Court has in recent times moved away from the requirement of ‘likeness’ between the original and breaching offence.

<sup>106</sup> *Greaves v Smith* [1986] Tas R 120.

<sup>107</sup> See [REDACTED] COPS, Evans J, 11 July 2002), discussed further below.

<sup>108</sup> *Davies v Dillon* (Unreported, Tas SC, Zeeman J, 12 May 1995). Cf *DPP (NSW) v Cooke* (2007) 168 A Crim R 379.

<sup>109</sup> The sentence the offender received for the breaching offence was nominated by three sentencers as a relevant factor when deciding whether to activate a sentence: see [3.4.6], (Q16).

Appendix J sets out the details of the 15 cases actioned in 2002-2004. In seven cases, the sentence was activated in full and in two cases activated in part.<sup>110</sup> Five offenders had their sentence resuspended or the operational period extended and one offender was sentenced to the rising of the court (STROC). Overall, therefore, the sentence was activated in part or full in 13 out of 22 cases. In other words, the sentence was activated in just over half the cases, a finding which runs counter to the assertion of four judges in Chapter 3 that they would generally activate a breached suspended sentence.<sup>111</sup>

### 7.6.2.1 Exercise of the discretion under section 27

My findings above demonstrate that very few cases of breach are brought before the Court. Accordingly, there is a paucity of case law about the exercise of the prosecutorial discretion to initiate breach proceedings, although this issue was considered in the decision of *Burns*.<sup>112</sup> The offender was sentenced for manslaughter but the sentence was wholly suspended on various conditions including that the offender be of good behaviour and commit no offence punishable by imprisonment for a period of two years. The breach application was made on the basis that he ‘breached the condition of the order suspending sentence that he be of good behaviour for a period of two years by committing the offences...between the 2nd November 2000 and the 18th of February 2002’. Slicer J considered the application in the context of section 27 in the following terms:

Whether the application brings into effect both portions of s27(1) has little import since the effect is the same. It would appear that the second part of the section enables activation by the commission of an offence irrespective of whether such a condition was imposed. Here the application is for breach of a condition, evidence of which is the commission of further offences.

This statement clarifies that the Court does not perceive a need for the prosecution to wait until there has been a clear breach of an express condition of a suspended sentence before commencing breach proceedings. The fact that the Court has demonstrated its willingness to entertain a breach application following the commission of an imprisonable offence during the operational period, even where the expressed condition of the suspended sentence has not been breached, further highlights the significance of my findings that breach action was taken in less than 6% of cases where such an offence had been committed. It also contradicts the assertion of the DPP that ‘in general terms, if it’s like for like, I would tend to put it up’.<sup>113</sup> Clearly, there are many cases of like instances of offending which are not brought before the Court.

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<sup>110</sup> This includes *Corey Hooper* (COPS, Slicer J, 13 December 2002), where two suspended sentences were activated in full and one resuspended and *Nathan Earley* (COPS, Slicer J, 21 August 2002), where a reduced term was activated to allow for time already served.

<sup>111</sup> See [3.4.6], (Q16). It must be noted, however, that the 22 actioned cases include cases dealt with by former Chief Justice Cox, who was not interviewed.

<sup>112</sup> *Clinton Burns* (COPS, Slicer J, 15 April 2003).

<sup>113</sup> Meeting with DPP, n 14.

On the other hand, in the cases of *Beeton*<sup>114</sup> and *Hill*,<sup>115</sup> there is not only a striking similarity between the offenders' personal circumstances, but in both cases the Crown did not in fact seek to activate the sentence. In *Hill*, Crawford J noted 'A little unusually, the Crown does not seek to have activated the 1998 suspended sentence because there are signs that she is achieving rehabilitation.' The decision to bring breach action in circumstances where the prosecution does not seek activation surely begs the question why these particular cases were brought before the Court when there appear to be so many cases not coming under such scrutiny.

The case of *TB* also provides an interesting example because of the apparent zeal with which a perceived breach was prosecuted, even when the express conditions of the sentence were not breached. The original sentence of six months imprisonment was suspended 'on condition that [the offender] commit no crime or offence involving dishonesty or violence to the person or property'. The offender committed his first offence three months after release from custody and, by the time of the sentence for breach, he had committed 13 new offences, as well as being sentenced for a charge of assaulting police committed before the imposition of the suspended sentence. What is of interest is that none of the new offences was technically a breach of the condition of suspension: the offender was convicted of driving with a prescribed content of alcohol, failure to appear, disorderly conduct and failure to obey a police officer's direction. As stated above, however, he was required not to commit any offence involving dishonesty or violence, and he had complied with this condition. One possible interpretation is that there was an error in thinking that the assault against police, clearly an offence involving violence, was committed after, rather than before, the suspended sentence was imposed. Alternatively, the DPP may have decided that the further examples of offending were sufficient to activate the discretion to apply for breach proceedings under section 27. Unfortunately there were no COPS in this case and there is little guidance to be gleaned from the Supreme Court record, which merely states:

Breach of suspended sentence (imposed) on [date] for offence [date] - sentenced to all orders imposed on [date] except 91 hours community service which are cancelled. Sentencing in lieu: \$1000.

### 7.6.2.2 Factors relevant to the judicial discretion on breach

In Chapter 3, judicial officers discussed their approach to breaches of suspended sentences. In this section, I consider cases exemplifying key factors which appear to be relevant to the decision whether to order a suspended sentence to take effect and make some general observations about the principles which apply in relation to the discretion to activate a breached sentence. Just as with the decision to suspend, it would seem that a number of factors will generally be nominated in cases where the court does not activate the sentence.<sup>116</sup>

<sup>114</sup> *Teena Beeton* (COPS, Crawford J, 17 April 2003).

<sup>115</sup> *Kaylene Hill* (COPS, Crawford J, 27 February 2003).

<sup>116</sup> The SAC also found that 'In most cases the court pointed to a number of different factors which, when present in some combination in a particular case and considered together, constituted exceptional circumstances. Therefore, while there appear to be substantial similarities between factors

### **Nature of the offences**

It is unsurprising to find that the nature of the breaching offence plays a significant role in determining whether the breached sentence is activated and this was the factor nominated by the most respondents in Chapter 3 as influencing their decision to activate a breached sentence. In *Minney*,<sup>117</sup> the sentence for indecent assault was partly suspended 'on condition that the offender was to commit no crime or offence involving violence or sexual elements'. The offender committed two further indecent assaults. Crawford J observed, sentencing the offender for both the breaching and breached offences at the same time:

The breaches, on two occasions, must be considered flagrant ones, having occurred within less than four months of his release from prison. I have no doubt that he should be ordered to serve the balance of the sentence and that it should be served cumulatively with the sentence just imposed.

In *Damien Williams*,<sup>118</sup> Cox CJ dealt with three breached sentences, which had been imposed for aggravated burglary, stealing and receiving. The sentences were breached by an instance of aggravated burglary and theft. Somewhat unusually, he activated the balance of two partly suspended sentences, but ordered that the third be varied and the sentence resuspended on the offender's release from custody, declaring that 'to activate the entire penalty on top of a sentence of two years' imprisonment may be so crushing as to be counter-productive'.

Similarity between the original and breaching offences will not always result in activation, however. In *Hill*,<sup>119</sup> discussed further below, both the original and breaching offences were aggravated burglary and stealing but the operational period was simply extended on breach. The sentence was also continued in the case of *LO*, one of the seven actioned cases, where the offender received a wholly suspended sentence on condition of good behaviour for aggravated robbery and burglary. He re-offended a mere week later and by the time of the breach proceedings had committed 24 new offences, including several counts of aggravated burglary, stealing, obtaining a financial advantage and driving with a prescribed content of alcohol. Unfortunately, the reasoning behind the decision to resuspend the sentence is unclear, as there were again no COPS and the Supreme Court record merely states:

Breach of suspended sentence - pursuant to s.27(4) of the Sentencing Act her Honour imposed in place of the sentence handed down on [date] the following sentence: 18 months imprisonment wholly suspended on condition to be of good behaviour and commit no offence of dishonesty for 2 years from [today].<sup>120</sup>

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accepted by the court as amounting to exceptional circumstances and factors that were rejected, in each case it appeared to be the unique combination, rather than the individual factors themselves, which led the court to this finding': SAC DP, n 4, [4.58].

<sup>117</sup> *R v Minney* (2003) 12 Tas R 46.

<sup>118</sup> *Damien Williams* (COPS, Cox CJ, 23 October 2002).

<sup>119</sup> *Kaylene Hill* (COPS, Crawford J, 27 February 2003).

<sup>120</sup> In a postscript, it is interesting to note that this offender was evidently still not fearful of the consequences of his actions. Less than three months later, he committed two counts of wounding and assault, as well as another aggravated burglary and two counts of destroying property, for which he received an unsuspended sentence. Nonetheless, it would seem to send the wrong message if offences committed in breach of a suspended sentence result first in a continuation of the suspended sentence



In *Ebert*,<sup>121</sup> the sentence was also not activated even though the breach offence was of the same kind as the original offence, albeit less serious. The offender, who had prior convictions relating to cannabis use, received a wholly suspended sentence for trafficking in cannabis. At the time the original sentence was imposed, the offender was using cannabis every day. Crawford J conceded when dealing with him for the breach offence of possessing and using cannabis that '[t]he suspended sentence does not seem to have had any impact on him in that regard because on his own admission today he continued to be a regular user, every night'.<sup>122</sup> By the time of the breach proceedings, however, the offender said that he had not used cannabis for some weeks. Accordingly, Crawford J decided to give him 'one more chance', by extending the operational period, adding:

He is an addict and personal use by an addict is not a particularly serious offence in my view, whereas if he had been trafficking or selling, growing a quantity or being in possession of a large quantity, that would have been a serious breach, as would a burglary, a stealing and many other kinds of offences.

It is clear that the breaching offence doesn't have to be exactly the same kind of offence as the original offence in order to be activated, although it may be on a continuum. In *Poole*,<sup>123</sup> the original sentence was imposed for attempted robbery and suspended on condition that the offender commit no crime or offence involving dishonesty, violence to the person or property. The breach offences were wounding and causing grievous bodily harm, clearly offences of violence. Underwood J stated:

The seriousness of the crimes are such that a sentence of imprisonment is necessary to punish you and to deter you from a repetition of this kind of criminal conduct as well as to send a message to others that the Courts will not tolerate unprovoked violence perpetrated in broad daylight upon innocent strangers walking on the public streets. I will not suspend any part of the sentence because you have already been given that chance and thrown it away and because it is more appropriate the Parole Board deal with you at the right time.

In *Law*,<sup>124</sup> the offender originally received a partly suspended sentence for armed robbery, suspended on condition of good behaviour. He then proceeded to commit a number of drug offences and a serious assault, for which he was sentenced to prison, as well as a count of destroying property, for which he received a fine. Crawford J stated:

I understand the submission that was made to me by [counsel] urging me not to activate the six month suspended part of the original sentence, but having regard to the offending that has taken place following his release from prison, I determine that the only appropriate course is to in fact activate it.

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and then in a lack of breach action. It is arguable that for the purposes of maintaining the integrity of the breach process, action should be taken even if an offender has already been dealt with by the courts for the offences constituting the breach, although this would raise issues of totality for any sentence imposed for the breached sentence.

<sup>121</sup> *Clinton Burns* (COPS, Slicer J, 15 April 2003).

<sup>122</sup> *Colin Ebert* (COPS, Crawford J, 23 June 2004).

<sup>123</sup> *Kirsten Poole* (COPS, Slicer J, 5 December 2002). See also [REDACTED] (COPS, Evans J, 11 July 2002), discussed below. The original sentence was imposed for burglary and breached by trafficking in a narcotic. The sentence was activated in full on breach.

<sup>124</sup> *Drew Law* (COPS, Crawford J, 19 November 2003).

As the case of *Burns*<sup>125</sup> demonstrates, the sentence may also be activated even when the breaching offence is much less serious than the original offence. In that case, a wholly suspended sentence was imposed for manslaughter, suspended on condition that the offender be of good behaviour and not commit an offence punishable by imprisonment. The offender committed numerous offences, some of which were 'minor and would not, of themselves, warrant the activation of the sentence'. A list of offences said to warrant activation was attached to the application and included 'significantly, unlicensed and negligent driving, possession contrary to the *Police Offences Act*, possession of a narcotic, failing to comply with a direction, abuse and threatening of a police officer, resist arrest and urging a dog to attack a person'. Slicer J considered that the 'latter offences occurring on 18 February 2002 have greater import in that they are offences for violence for which the offender had been previously convicted in June and July 1998'. He stated, before activating four months of the nine month wholly suspended sentence:

The conduct of the offender since the imposition of the suspended sentence shows a continuing pattern of general anti-social conduct. The events of 18 February 2002 show a repetition of escalating conduct whereby a relatively minor incident leads to substantial confrontation...

Persons given the advantage of a suspended sentence, especially in circumstances involving the taking of life, ought realise that such a sentence is not an empty gesture. It is for them to comply with the conditions or face the consequence.

It follows from this discussion that the nature of the offence is a significant but not predictive factor in determining whether the breach sentence will be activated. This finding may support the general assertion by some judges in Chapter 3 that a breached sentence will be activated,<sup>126</sup> which may occur regardless of the nature of the offences.

### ***Circumstances of the offender***

Courts will often be reluctant to lose the benefit of rehabilitation which is already underway, with the Western Australian Court of Criminal Appeal holding in *Duncan*<sup>127</sup> that where there has been a lengthy process of rehabilitation prior to sentence, 'the punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of that rehabilitation'. In *ZN*, Underwood CJ emphasised that in the ordinary course of proceedings when a suspended sentence is breached he would order that the sentence take effect, 'otherwise there is no point in the Court talking about general deterrence'. In the present case, however, he was swayed by the fact that the offender was still struggling with the difficulties which had given rise to the suspension of the original sentence, although there was no detail provided as to how this situation justified further mercy from the court, given that it had already been taken into account at the

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<sup>125</sup> *Clinton Burns* (COPS, Slicer J, 15 April 2003).

<sup>126</sup> See [3.4.6], (Q16).

<sup>127</sup> *Duncan v The Queen* (1983) 47 ALR 746, 749. See discussion in Warner, n 101, [3.220].

time of the original sentence. The breached sentence, which was for offences of the same kind as the original offence, was activated in part.

In *DK*, Crawford J decided to resuspend the sentence on account of the offender's difficult personal history, mental health issues, stable relationship and employment. He stated:

At the outset of the hearing of the application I expected to order that the suspended sentence take effect. However, in the light of the information now before the Court I do not see that the public interest requires it. The course that will be taken will be merciful but at the same time it will continue the expectation of him that he must not re-offend.

As discussed in Chapter 5,<sup>128</sup> evidence of a stable relationship or parental responsibility is regarded by the Court as a significant factor in deciding to suspend a sentence. It would also appear to be regarded as a good reason not to activate a breached sentence. In *Beeton*,<sup>129</sup> the offender had breached a suspended sentence imposed for armed robbery and supplying drugs by committing 'a number of offences', including assaulting police, however Crawford J regarded these offences as 'not extremely serious'. Since her release from custody for another offence, the offender had been under the supervision of a probation officer and her compliance and attitude had been 'excellent'. At the time of the breach proceedings, she was pregnant and was caring for another child and lived with her fully employed partner and his mother in the country. In light of these indications of reform, Crawford J stated, 'I congratulate you, because I am well aware of the temptations and problems you have faced', adding that 'it would not be a good idea to interrupt your rehabilitation'. He therefore extended the operational period by a further 18 months.<sup>130</sup>

There was a similar result in *Hill*,<sup>131</sup> where the offender was pregnant and complying with her probation order, her partner was engaged in full-time employment and they had recently bought their own home. She had been only 15 years old at the time of the original offences of aggravated burglary and stealing, having been 'led into criminal activity by two older males, one of whom was her brother who had a bad record for offences'. Crawford J referred to the submission by counsel that the offender had 'made a decision to break off her association with drugs and with other offenders. That resulted from an ultimatum from her mother'. Counsel's suggestion that she had 'remained drug free for nearly three years' was 'not borne out by the pre-sentence reports, but her use of drugs has diminished'. Crawford J also noted that

<sup>128</sup> See [5.3.4.2].

<sup>129</sup> *Teena Beeton* (COPS, Crawford J, 17 April 2003).

<sup>130</sup> As discussed in [2.2.5], in Victoria, the court is required to activate sentence unless it is of the view that 'it would be unjust to do so in view of any exceptional circumstances which have arisen' since the original order was made'. It is therefore interesting to note the case of *Kent v Wilson* [2000] VSC 98, where it was held that the fact that the offender had gained employment, was learning a trade, was in a new relationship and was living independently did not amount to 'exceptional circumstances', but merely 'changed circumstances'. On the other hand, there were several cases examined by the SAC where parental responsibility, employment and/or a stable relationship were held to justify exceptional circumstances: SAC DP, n 4, Table 7.

<sup>131</sup> *Kaylene Hill* (COPS, Crawford J, 27 February 2003).

the offender had had some employment, although her pregnancy would ‘limit her for work for a time, of course’. Crawford J considered that it would be ‘in society’s interest that her rehabilitation be encouraged’ and decided to give her ‘one more chance’, adding however that ‘[s]he should not expect it again’.

*Hooper*<sup>132</sup> was sentenced for aggravated armed robbery, partly suspended on condition that he ‘commit no crime or offence involving dishonesty or violence to the person or property’. He breached the sentence by committing four counts of stealing a motor vehicle. On the breach proceedings, Slicer J stated that in ‘the course of the plea in mitigation, significant matters were advanced which suggested maturation and change, including:

- (1) co-operation with the Probation Service;
- (2) cessation of substance abuse and a change of associates;
- (3) inability to complete the order of community service due to injury and with the agreement of his probation officer;
- (4) his current age (20 years);
- (5) the undertaking of a college course;
- (6) the performance of voluntary youth educational work with disadvantaged children;
- (7) the stability of a relationship and the impending birth of a child;
- (8) the delay in the commencement of breach proceedings.

As discussed below, in this case, the issue of delay was not regarded as being of much weight, but the combination of factors led Slicer J to determine that the ‘Court accepts the material provided by, and opinion of the probation officer, and will afford Mr Hooper a further opportunity to continue the process of maturation’. A substituted sentence taking account of time served was resuspended.

The case of *Earley*<sup>133</sup> demonstrates that the mere prospect of parental responsibility will not suffice to keep an offender out of jail. In that case, the offender had received a suspended sentence for armed robbery and breached it with several instances of stealing and breach of bail. Upon the breach proceedings, Slicer J stated that ‘[t]he Court was told that Mr Earley had the responsibility for the care and control of his 17 month old son since the mother had relinquished custody because of personal difficulties. That is not the case’. It is unfortunately unclear what Slicer J was referring to in this context, which again demonstrates the need for clearer elucidation of relevant factors in judicial sentencing comments. Slicer J noted that the offender had also ‘not been assiduous with his dealings with the probation service’. He activated the sentence in part and said:

The sentence was suspended so as to permit the offender a chance to put his life in order. Supervision was ordered as a method of both help and control. He has not taken the opportunity offered and it makes little sense to suspend sentences and ignore subsequent conduct.

Another factor which would seem to be favourably regarded by the Court is where an offender has recently spent time in custody. At the time of the breach proceedings in

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<sup>132</sup> *Corey Hooper* (COPS, Slicer J, 13 December 2002).

<sup>133</sup> *Nathan Earley* (COPS, Slicer J, 21 August 2002).

*Burns*,<sup>134</sup> the offender had been in custody for various matters for over three months, a fact which Slicer J felt ‘might have brought home the consequence of [his] conduct’. Accordingly, he ordered that four of the nine months of the sentence take effect with the balance resuspended.<sup>135</sup> There was a similar result in *A*,<sup>136</sup> where Cox CJ referred to the further custodial sentences imposed on the offender and said that ‘[h]opefully...[these] will have the effect of convincing you that if you do take the law into your own hands again or offend in any other way, you will be punished and so indirectly will the members of your family’.

### **Time factors**

In Chapter 3, the time between suspension and breach was nominated by seven judicial officers as influencing the decision on whether a suspended sentence would be put into effect. One of the related key issues is the time it takes for breach proceedings to be heard.<sup>137</sup> In *RN*,<sup>138</sup> this was expressly referred to by the sentencing judge as the reason for not activating the suspended sentence. The original sentence of six months’ imprisonment, wholly suspended on condition that the offender commit no crime or offence involving dishonesty for two years, was imposed for aggravated burglary and stealing. Less than two months later, in October 2003, the offender committed fraud against a Government agency, for which she was sentenced only in February 2006. She also committed a further burglary in September 2004, for which she was sentenced in February 2005. The breach proceedings were only heard in November 2006, at which time Blow J described the events to which the application related as ‘all a bit stale’. He went on to say that if the application ‘had been brought before me 18 months or so ago, and it could and should have been, I might have taken a tougher course’. However, as the offender had not offended further in over two years, Blow J decided that it was inappropriate to order her to go to prison. On the other hand, he said, that ‘as she breached the conditions of the suspended sentence that I imposed so soon after I imposed it, I do not think this is an appropriate case for me to do nothing’. Accordingly, he extended the operational period by a further two years.

Delay was also an issue in *JN*, although it did not appear to benefit the offender, who had originally received a wholly suspended sentence for aggravated armed robbery. He first re-offended less than two weeks after the suspended sentence was imposed

<sup>134</sup> *Clinton Burns* (COPS, Slicer J, 15 April 2003).

<sup>135</sup> This may be a means of giving effect to the totality principle that a sentence not be ‘crushing’: Warner, n 101, [9.409].

<sup>136</sup> *A* (COPS, Cox CJ, 20 August 2002).

<sup>137</sup> See also *R v Nagy* [2007] SASC 221, where it was stated: ‘One can understand the reason for not attempting to prove the breach until the breaching offences are dealt with. However, that is no reason for delaying the application to enforce the bond... There is no excuse for delaying the commencement of the breach of bond proceedings for so long’: [23]-[24] (Bleby, Sulan and David JJ).

Note comments by the DPP that breach proceedings are initiated ‘very soon after’ the conviction is entered, although he conceded that ‘service is often the trouble’, adding, ‘it’s a good time to be scarce!’: Meeting with DPP, n 14. Mollon also commented on the difficulties of serving the breach application: see discussion in [7.2].

<sup>138</sup> Although I doubt it made any difference to the decision, it should be noted that these breach proceedings were heard by Blow J after I had interviewed him on his use of suspended sentences.

and proceeded to commit 15 further offences during the 12 month operational period, including several counts of burglary and stealing. He received an unsuspended sentence for the 15 offences in breach of the suspended sentence in November 2003, but was not convicted and sentenced for the breach itself for more than three years. No explanation was given for this delay. Indeed, Crawford J did not give any explanation for his decision to activate the sentence in full, the comments on sentence stating in their entirety:

I usually say it, and I will say it again, that when applications to review suspended sentences come before the Court as a result of breaches of conditions, the usual order is that the sentence be activated, otherwise such orders have little effect and have no deterrent value, and I see no reason why it should not be put into effect here.

The order is that the suspended sentence of three months' imprisonment that was imposed on [date] take effect from [today].

In *DK*, the offender originally received a wholly suspended sentence for burglary, stealing and motor vehicle stealing. During the operational period of the sentence, he committed three offences, one of which was serious. The breach action was taken in respect of a stealing offence, which was committed on an unknown date between two and 16 months after the suspended sentence was imposed. He was convicted of that offence and received a fine some three years and four months after the suspended sentence had been imposed. After being convicted for this offence, it took over six months for the breach application to be heard, a matter Crawford J adverted to in breach proceedings by saying that '[t]he delay in the making of the present application to have him dealt with for the breach is accounted for by the time it took for the proceedings for the breaching offence to be completed in the magistrates court'.<sup>139</sup> Part of the delay was doubtless due to the fact that the breaching offence was resolved in the Magistrates' Court, while the suspended sentence was an order of the Supreme Court. Nonetheless, it would seem appropriate to ensure that matters which have clearly been breached are brought before the appropriate judicial officer in a timely fashion.

It is in this context important to note the case of *Minney*,<sup>140</sup> where the application for breach was dealt with at the same time as sentencing the offender for further indecent assaults.<sup>141</sup> This meant that after going through the details of the breaching offences and sentencing the offender separately for them, Crawford J was simply able to declare that there was 'no question and it was not challenged by the prisoner's counsel, that by committing the two offences in December 2002 he breached the condition of the suspended sentence'.

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<sup>139</sup> See also *Corey Hooper* (COPS, Slicer J, 13 December 2002), discussed further below. One of the factors 'advanced which suggested maturation and change' was 'the delay in the commencement of breach proceedings'. Although the delay was acknowledged to be 'significant', Slicer J declared that '[l]ittle weight is given to the issue of delay'. The sentence was resuspended for other reasons.

<sup>140</sup> *R v Minney* (2003) 12 Tas R 46.

<sup>141</sup> Some judicial officers I interviewed desired that breach proceedings be dealt with contemporaneously with sentencing for the offence constituting the breach: see [3.4.6], (Q18). For discussion of the appropriate sequence for dealing with such matters, see *DPP (NSW) v Cooke* (2007) 168 A Crim R 379, [28].

The case of *ZN* provides an example of expeditious but not contemporaneous breach action. In that case, the offender originally received a nine month wholly suspended sentence for stealing in breach of trust. Some 18 months later, he committed a string of social security frauds, for which he received a partly suspended sentence. Less than six weeks after he was sentenced for these offences, the breached sentence came back before the Court and was activated in part. The case of *KK* also provides an example of the authorities acting with haste in managing breach proceedings. The offender had originally received a partly suspended sentence for burglary. He was released from custody in January 2004 and first re-offended by committing another burglary some five months later, for which he was convicted a further five months later. Breach proceedings were heard less than three months after his reconviction and 14 months after his release from custody. Unfortunately, the factors considered by the court in deciding to activate the sentence are not apparent as there were no COPS. The Supreme Court record for this offender merely states:

Breach of suspended sentence (imposed) on [date] for offence [date] – partly suspended sentence of 9 months imprisonment to be activated and to take effect cumulatively with term imposed in the Launceston Magistrates Court on [date].

The small number of cases considered in this Chapter and the lack of detail in the COPS means that there is still a lack of certainty as to how the courts should approach breach cases. Nevertheless, this discussion sheds some light on how judges deal with breach proceedings and thereby complements the discussion in Chapter 3.

### 7.7 Conclusion

This Chapter presents a quantitative and qualitative analysis of breaches of suspended sentences imposed in the Supreme Court and consideration of the legal provisions for breach proceedings. The policies and procedures for dealing with breaches are examined and my discussion is informed by discussions with prosecuting officers. In order to determine the applicable legal principles in breach proceedings, I discuss the limited existing case law, as well as examining sentencing comments in 22 recent cases where breach action was taken. My findings confirm that the nature of the breaching offence plays a significant role in determining whether the breached sentence is activated. Delay in proceedings is regarded as a relevant factor and as with the decision to impose a suspended sentence, parental responsibility appears to be regarded as a good reason not to activate a breached sentence.

The principal finding of this analysis is that there is an overwhelming lack of action taken by the prosecuting authorities in Tasmania in respect of breached sentences. Breach action was taken against only seven out of 126 offenders apparently in breach of their suspended sentence, a situation which the TLRI has described as quite clearly unacceptable, as this ‘makes a farce of the suspended sentence – the sword of Damocles is barely a butter knife’.<sup>142</sup> I acknowledge that it would often be inadvisable and impracticable to initiate proceedings in all cases of apparent breach.

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<sup>142</sup> TLRI, n 6, 30.

## 7. Breach analysis

Some quite minor offences are punishable by imprisonment,<sup>143</sup> and would therefore technically enliven the discretion to take action, but would be an inappropriate use of limited prosecution resources. As the DPP observed, if ‘we were putting up every breach, that would be a substantial amount of counsel’s time and our trouble in preparing those applications, and serving them, and court time to do them’. On the other hand, it is highly undesirable that there be so significant a disjunction between policy and practice. If there is no intention by the prosecuting authorities to take action in all cases where the offender has either breached an express condition of the suspended sentence or committed an imprisonable offence, then it may be appropriate that the legislation be amended to reflect the terms on which breach action is in fact likely to be taken, a proposition which the DPP regarded as ‘a reasonable point’.<sup>144</sup> As discussed, it is already proposed to amend the legislation in this regard to provide that the court must order that the sentence to take effect unless it concludes it would be unjust to do so.

There is also a clear need for better case management for dealing with breaches. To this end, the DPP has suggested the need for computer software which presents an automatic notification when an offender on a suspended sentence commits a further imprisonable offence, a suggestion supported by one judge I interviewed and the PPS.<sup>145</sup> The PPS has also considered introducing a system where a complaint would be generated in the computer system to ‘run along side the new offence in the court system’. In the event of conviction for the new offence, the defendant could be sentenced for the breach’.<sup>146</sup>

If the lack of prosecutorial action were known to offenders, it would make for a very blunt Sword of Damocles. The failure to prosecute breaches may contribute to a legitimate public perception that suspended sentences are a mere slap on the wrist. It is beyond the scope of this discussion to propose a model which will most efficiently and effectively ensure that breaches are dealt with appropriately, but my analysis highlights the need for better processes for dealing with breaches, including consideration of the use of computer software to automatically notify of apparent breaches, as well as improving communication about breaches between the relevant stakeholder groups. In order to ensure that breaches are identified and proceedings brought more effectively and expeditiously, I suggest a need for closer liaison between the DPP, Police Prosecutions, Department of Justice, Community

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<sup>143</sup> By way of example, swearing or using indecent language in a public place or within the hearing of any person in that place is subject to a prison sentence of three months: *Police Offences Act 1935* (Tas), s 12 and placing dangerous junk such as a wardrobe in a public place attracts a penalty of six months: s 19AA.

<sup>144</sup> Meeting with DPP, n 14. He added that ‘it’s not really my role, as DPP, to start suggesting to the Commissioner of Police that he needs to go instituting electronic systems at great expense to go do this’.

<sup>145</sup> See [3.4.6], (Q18). In the event of such a computer program being developed, the DPP suggested that a clerk, equipped with clear guidelines, would be required to make a preliminary assessment as to whether breach action should be taken. It would seem that this role is already filled to some extent by OIS.

<sup>146</sup> Suspended Sentence Applications, n 20.



## 7. Breach analysis

Corrections, Youth Justice and Supreme and Magistrates' Courts. These proposals have been adopted by the TLRI in its draft report.<sup>147</sup>

The TLRI also commends the efforts made to date by the DPP and Tasmania Police to ensure that proceedings for breach are initiated in all cases and in a timely manner and suggests the need for a review of such changes to ascertain whether they have produced improvements.<sup>148</sup> The discussion in this Chapter provides an essential foundation for such a review.

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<sup>147</sup> TLRI, n 6, 30

<sup>148</sup> *ibid*, 31.

## 8. CONCLUSION

*Whatever the theoretical and practical objections, suspended imprisonment is both a popular and much used sentencing option in Australia. Courts may not ignore the provision of this option because of defects occasionally involved in its use.*<sup>1</sup>

### 8.1 Introduction

This thesis examines the use and utility of suspended sentences in Tasmania. The key questions I sought to answer were: How are suspended sentences used by judges and magistrates? What is the process for imposing a suspended sentence? How effective are suspended sentences as a specific deterrent or rehabilitative measure? How are breaches dealt with? I also examine the incidence of net-widening and sentence inflation; the impact of suspended sentences on the prison population; the use of suspended sentences for serious offences; measures to increase the punitive and rehabilitative effect of the sentence; the role of public opinion and the importance of communication.

In this Conclusion, I examine how my key findings support the principal arguments for and against suspended sentences which are discussed in Chapter 1.<sup>2</sup> I do not attempt to finally resolve the merits of each case, but to add to the evidence base for the arguments put by each side.

### 8.2 The case for suspended sentences

#### 8.2.1 Suspended sentences have a symbolic effect

It has been suggested that suspended sentences enable courts to denounce serious offending, while allowing the offender to be dealt with in a merciful way. In the judicial comments in Chapter 3, it emerged that denunciation was not in fact regarded as being a key objective of suspended sentences, although judges regarded it more highly in this context than magistrates. Nevertheless, judicial officers were strongly opposed to the abolition of suspended sentences and cited examples where they would impose such a sentence as a message to both the offender and the community, thereby supporting the view that suspended sentences have a symbolic effect.

#### 8.2.2 Suspended sentences are an effective deterrent

Traditionally, suspended sentences have been regarded as a Sword of Damocles hanging over an offender's head, an image which suggests such sentences are an effective deterrent. This image is borne out by my reconviction analysis in Chapter 6, which found that of the four sentencing dispositions studied, wholly suspended sentences have the best reconviction rates, followed by partly suspended sentences. This result remained even after controlling for the sentencing judge, age group, gender, prior record and offence type and seriousness. Furthermore, of those who were reconvicted, offenders on a wholly suspended sentence were reconvicted of less serious offences. My comparison of the number of offences committed in the period

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<sup>1</sup> *Dinsdale v The Queen* (2000) 202 CLR 321, [76] (Kirby J).

<sup>2</sup> See [1.4] and [1.5] respectively.

before and after the sentence was imposed also indicates that offenders on a suspended sentence committed fewer offences after the suspended sentence was imposed than in the equivalent period before the sentence, whereas the number of offences committed by offenders on a non-custodial order increased.

The reconviction analysis showed that first offenders performed poorly on a wholly suspended sentence, compared with unsuspended and partly suspended sentences, a finding which at first blush might contradict the conventional wisdom that wholly suspended sentences are particularly appropriate for first offenders. On the other hand, first offenders demonstrated lower breach rates than more seasoned offenders. Reconviction analysis on the basis of age indicated that younger offenders were less likely to be reconvicted on wholly or partly suspended sentences than on unsuspended sentences or non-custodial orders, which lends some support to the view that young offenders should be given suspended sentences, although younger offenders were more likely to breach their sentence than older offenders.

In addition, the reconviction analysis demonstrates that offenders who received a wholly suspended sentence for a serious offence were not only least likely to be reconvicted than where other sentencing options were imposed for serious offences, but they were also least likely to commit a further serious offence. These findings suggest that suspended sentences therefore cannot be regarded from a recidivism perspective as an inappropriate penalty for serious offences. Overall, my findings indicate that suspended sentences do ‘work’, suggesting they can be an effective deterrent.

In this context, it is important to note that although my study does not control for all the relevant variables which influence re-offending risk, it does overcome a common methodological limitation of reconviction studies, namely, that they fail to take into account changes in the severity or frequency of subsequent offending. It also examines the significant impact of pseudo-reconvictions and highlights the need for caution, when attempting to assess the impact – if any – of a particular sentencing disposition, in correctly identifying the incidence of offending after the imposition of a sentence. My findings reinforce the need for information on reconviction rates to be gathered on a regular basis to maintain a current awareness of the performance of sentencing outcomes. Further research is also needed to explore these findings on a wider scale, including reconviction rates for offenders originally convicted in the Magistrates’ Court.

### **8.2.3 Suspended sentences provide a useful sentencing option**

It has been argued that sentencers should have more, not fewer, sentencing options, and that suspended sentences are a key part of a sentencer’s armoury. As noted above, Tasmanian judicial officers were strongly opposed to the abolition of suspended sentences. Although the judicial interviews in Chapter 3 and content analysis of sentencing comments in Chapter 5 indicate that there are some instances of inappropriate use of suspended sentences, the quantitative analysis in Chapter 4 reveals that suspended sentences are rarely imposed for very serious offences, a finding which conforms with judicial statements that they are generally inappropriate for such offences. Suspended sentences are also rarely imposed for lengthy periods,

with no wholly suspended sentences in my study exceeding two years. These findings have informed the TLRI's decision not to recommend offence- or length-based restrictions on the availability of such sentences and suggest that suspended sentences are generally used in appropriate circumstances in Tasmania.

Tasmania is a jurisdiction with a comparatively narrow range of sentencing options. My findings support the argument that in such a context, suspended sentences are not only a useful sentencing option but play a vital role and should therefore be retained. This does not mean, however, that there should not be considerable improvements in their use and my study suggests a number of ways in which this should be done.

### **8.2.4 Suspended sentences enable offenders to avoid short prison sentences**

There is abundant research to suggest that there is generally little benefit to offenders or the community as a whole as a result of short prison sentence. The quantitative analysis in Chapter 4 and the qualitative analysis of sentencing remarks in Chapter 5 explore the use of suspended sentences and the kinds of cases in which they are imposed. Judicial comments in Chapter 3 indicate that minimising offenders' exposure to the adverse effects of prison is a relevant consideration for the majority of judicial officers when imposing a suspended sentence. The judicial comments also suggest, however, that if suspended sentences were abolished, they would be unlikely to sentence all offenders currently in receipt of a suspended sentence to an immediate term of imprisonment.

The extent to which offenders are exposed to short prison sentences is also dependent in part on the prosecution of breaches. On the basis of data presented in Chapter 7, only 3% of offenders apparently in breach of their sentence are ultimately sentenced to custody, a result which points to significant failings in terms of the current prosecution of breaches, with less than 6% of cases of apparent breach brought back to court. Clearly, any change in prosecution practices in this regard would have a significant effect on the number of offenders exposed to prison. Nevertheless, my findings from the judicial interviews and the failure of the quantitative analysis to expose evidence of sentence inflation indicate that the availability of suspended sentences in Tasmania enables many offenders to avoid being sent to prison, generally for short periods.

### **8.2.5 The use of suspended sentences may reduce the prison population**

The comments on the foregoing issue are of course also apposite in the context of the effect of suspended sentences on the prison population. It is unfortunately beyond the scope of this thesis to quantify the precise effect of suspended sentences on the size of the prison population. Accordingly, further research should be undertaken to conduct a quantitative analysis of the number of prison days 'saved' by the imposition of suspended sentences. Any such analysis would also need to examine the effect of breach proceedings and any change in prosecution practices. Even in the absence of precise mapping of this nature, however, my findings suggest that the

wide use of suspended sentences in Tasmania has a significant effect in reducing the overall prison population.

### **8.3 The case against suspended sentences**

#### **8.3.1 A suspended sentence is not real punishment**

One of the principal objections to suspended sentences is that they do not constitute real punishment and the judicial comments in Chapter 3 suggest a high level of judicial awareness of this criticism. In this context, I examine the use of measures to increase the punitive bite of the sentence. The use of combination orders was generally supported by judges and magistrates, although there was concern about the utility of attaching a fine. My quantitative analysis in Chapter 4 shows that combination orders are imposed in over two-thirds of wholly sentences in the Supreme Court, with almost a quarter of offender subject to some form of supervision.

My discussion also examines the use of suspended sentences for offenders with special needs, such as addiction to drugs or gambling, in the context of increasing the rehabilitative component of a suspended sentence. The judicial comments in Chapter 3 yielded a broad range of views about the appropriateness of imposing a suspended sentence in such cases. The analysis of sentencing remarks in Chapter 5 suggests that it may be desirable to link supervision or participation in a rehabilitation program more frequently with suspension of the sentence for offenders with substance abuse issues, although caution needs to be taken to ensure offenders with mental health problems are not overloaded with orders which make breach an inevitable consequence.

Measures to increase the bite of a suspended sentence are also explored in the context of the reconviction analysis in Chapter 6. This analysis demonstrates that unsupervised offenders performed much better than those who were supervised, although it is unclear whether this poor outcome is because the higher degree of scrutiny picked up instances of offending which might otherwise have gone undetected. In fact, supervision, whether in combination with a suspended sentence or as a condition of suspension, appeared to be associated with higher reconviction rates and reconviction for more serious offences. These findings should be communicated to Community Corrections and further research undertaken to determine which aspects of the Tasmanian supervision model increase or decrease offenders' likelihood of reconviction.

Overall, my findings on the apparent efficacy of suspended sentences suggest that they are an adequate and appropriate form of punishment for many offenders. The force of the argument that suspended sentences are not real punishment is mitigated to some extent by the range of measures to increase the punishment component of a suspended sentence, although this may not lead to better reconviction outcomes.

#### **8.3.2 Suspended sentences are seen as a 'let off'**

Research indicates that suspended sentences are poorly regarded by the public and newspapers are replete with headlines shaping and reinforcing this perception. It was unfortunately beyond the scope of this thesis to explore community, victim and

offender perceptions of suspended sentences, although there is currently a large-scale project underway on sentencing and public perceptions in Australia and it is to be hoped that suspended sentences will be explored as part of this study.

My research indicates that judicial officers are aware of the criticism that suspended sentences are regarded as a ‘let-off’ and my questions on the role of public opinion explore the extent to which this awareness impacts on their use of suspended sentences and sentencing practice generally.

### **8.3.3 There theoretical difficulties in imposing a suspended sentence**

My findings in Chapters 2 and 3 support the contention that there are theoretical difficulties in imposing a suspended sentence. In particular, the judicial interviews in Chapter 3 suggest that some sentencers have misunderstood the effect of the *Dinsdale* two-stage test, a finding which is not entirely surprising, given that it is a difficult and paradoxical test to apply. As a result of my findings, the TLRI has suggested the need for statutory guidance about their imposition, which would bring Tasmania into line with many other Australian jurisdictions and may assist in clarifying the process for imposing a suspended sentence. I would endorse this proposal but suggest that any such guidance will need to involve consultation with the judiciary to ensure it is not met with resistance.

### **8.3.4 Suspended sentences cause net-widening**

Many critics of suspended sentences suggest that net-widening may cancel out much, if not all, of the supposed efficiency gains of suspended sentences in terms of reducing the use of actual prison sentences. My findings in Chapter 5 point to some instances of inappropriate use of suspended sentences, although it was not possible to point to clear evidence of significant net-widening. In addition, although some judicial officers acknowledged increasing the term of a sentence to reflect the fact of its suspension, it was suggested that this would be only to a small extent, and this was confirmed by the quantitative analysis in Chapter 4, which did not indicate any significant sentence inflation.

One issue which does reveal difficulties in this context is the extensive use of wholly suspended sentences for young and first offenders, seemingly at the expense of true non-custodial penalties. The problems associated with widening the net for such offenders are compounded by analysis which revealed that a prior wholly suspended sentence significantly increases the severity of any subsequent sentence, which may thereby prematurely push first and young offenders up the sentencing ladder. It should also be noted that although younger offenders performed well on suspended sentences in terms of reconviction, this analysis also indicated that first offenders performed surprisingly poorly on wholly suspended sentences.

Accordingly, although there is no clear evidence that suspended sentences cause significant net-widening or sentence inflation in Tasmania, there are instances of inappropriate use, especially for young and first offenders.

### **8.3.5 Suspended sentences favour middle-class offenders**

It has been suggested that suspended sentences are mainly used for offenders who are already privileged within the criminal justice system, namely, middle-class offenders. This issue is explored in Chapter 4 by analysing the use of suspended sentences for fraud offences. I also examine the relevance of good character and the consequential loss of conviction in the process of imposing a suspended sentence in Chapter 5. The judicial comments in Chapter 3 also provide examples of the circumstances in which judicial officers regard a suspended sentence as appropriate. My findings do not provide any clear evidence of a bias towards middle-class offenders in the use of suspended sentences. The fact that an offender's adverse personal circumstances were also regarded as a relevant factor in imposing a suspended sentence in a number of cases would also seem to suggest that suspended sentences are certainly not the exclusive province of the well-off.

### **8.3.6 Suspended sentences violate the proportionality principle**

It has been suggested that disproportionate sentences risk bringing the entire criminal justice system into disrepute. As discussed in Chapter 1, the argument that suspended sentences violate the proportionality principle also draws support from the lack of certainty inherent in the nature of inchoate sentences, making it difficult to place such sentences on a scale of severity. It is noted, however, that even desert theorists concede that it may not be appropriate to seek the abolition of conditional sentences. This thesis is focused on increasing the evidence base for the use of suspended sentences, for example, by providing data indicating that such sentences are only rarely used for very serious offences, which in turn suggests that the sentences currently imposed are not disproportionate to the nature of the offence. This thesis does not endeavour to resolve the philosophical tensions underpinning the argument that suspended sentences are a violation of the proportionality principle. Nevertheless, it is to be hoped that increasing the level of knowledge about how suspended sentences are used will contribute to a concomitant increased public confidence in the use of such sentences and the criminal justice system as a whole.

### **8.3.7 There are difficulties in dealing with breaches**

The thorny issue of dealing with breaches was explored in Chapter 7, with my findings revealing that there are indeed difficulties in the current processes in Tasmania. My analysis demonstrates that breach action is taken in only a very small proportion of cases, with numerous serious examples of offending going undetected or at least unprosecuted. This failure to deal appropriately with breached sentences not only reduces the effectiveness of the individual sentence, but may undermine confidence in the criminal justice system as a whole. In particular, I highlight the need to consider the use of computer software to automatically signal apparent breaches, as well as improving communication about breaches between the relevant stakeholder groups, proposals which have been supported by the TLRI. My findings have contributed to the TLRI calling for procedures in relation to breaches of sentencing orders to be radically overhauled.

The judicial comments in Chapter 3 indicate that the majority of judges would generally activate a breached sentence, although this was not confirmed by my

analysis of actioned cases, which revealed that just over half of the sentences were activated in whole or part. These findings have also led the TLRI to suggest a statutory presumption of activation on breach, which would bring Tasmania into line with the majority of Australian jurisdictions and would promote certainty, while still allowing for judicial flexibility in appropriate circumstances.

My analysis of the comments on passing sentence in breach cases also contributes to the development of a clearer understanding of the legal principles which apply in such circumstances and may assist future judicial decision-making. My findings also highlight the need for clearer enunciation of the factors relevant to the decision to activate a breached sentence.

### **8.4 The role of communication**

A key theme in my discussion is the importance of improving communication. My analysis of judges' comments on passing sentence indicates that there is a tendency to give only brief reasons for the decision to suspend a sentence, without detailing the evidence on which such decisions are based. The interviews also revealed that magistrates were more likely than judges to regard it as part of their judicial function to set out the factors leading them to suspend the sentence and explain the significance of a suspended sentence to the offender, although one judge observed that the more access the community has to the reasons why a sentence has been imposed, the better the response. In this context, it is important to note that there were also several breach cases where there were no sentencing comments setting out the factors considered in determining whether to activate the sentence. The lack of clear authority on this issue and the confusion amongst some magistrates as to the state of the law in respect of breaches highlights the importance of providing reasons to promote transparency and judicial accountability.

In my view, in light of the fact that suspended sentences are commonly poorly regarded and understood by the public, the media, victims and sometimes even offenders, it may be appropriate for both courts to review this issue, in order to determine whether there are ways of enhancing the flow of communication with offenders and the public generally, without undermining judicial discretion and independence.

There is also a need for better communication by other players in the system. Several judges and magistrates suggested that the media could do more to improve the accuracy of its reporting, and to this end, some advocated the appointment of a media liaison officer. There is also currently very little knowledge amongst judicial officers about the process for monitoring and dealing with breached sentences and most were keen to see more information of this nature. This finding suggests a need for the relevant authorities, namely, the Director of Public Prosecutions, police prosecutions, Community Corrections and the Department of Justice, to liaise to determine the appropriate means for gathering, maintaining and disseminating data on breaches. If information of this nature were coupled with more rigorous prosecution of breaches, it may also serve to enhance public confidence in the criminal justice system.



## 8.5 Conclusion

In conclusion, I argue that suspended sentences play a vital role within the Tasmanian sentencing framework. Notwithstanding their limitations, which are examined in Chapter 1 and reviewed above, in my view they amount to a sanction

that is sufficiently punitive to constitute an acceptable substitute for imprisonment, sufficiently flexible (in duration and with respect to the conditions imposed) to assure proportionality in sentencing and capable of advancing sentencing objectives that are well beyond the power of prison to promote.<sup>3</sup>

This discussion presents a detailed analysis of how suspended sentences are used by judges and magistrates. In particular, the quantitative analysis demonstrates extensive use of such sentences but no clear evidence of net-widening or sentence inflation. The process for imposing a suspended sentence is explored through the judicial interviews and analyses of sentencing remarks, suggesting there are some difficulties in applying the two-stage test. The deterrent and rehabilitative effect is examined by way of a reconviction analysis, which suggests that suspended sentences do ‘work’. These issues are also explored in the breach analysis, which highlights the urgent need for improving the management of breaches. My study also demonstrates the need for better communication about suspended sentences, especially by judicial officers when imposing such a sentence.

My findings greatly increase the level of knowledge about the use of suspended sentences in Tasmania and make methodological advances in the context of judicial interviews and reconviction and breach analyses. The fact that the Tasmanian Law Reform Institute has endorsed so many of my findings in its current sentencing review is further testament to the significance of this research. Freiberg has suggested that ‘[t]he objective is to sentence smarter rather than longer, to ensure that offenders are properly targeted, and that sentences are effective, credible and properly enforced’.<sup>4</sup> The discussion in my thesis makes a substantial contribution towards this objective.

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<sup>3</sup> Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, Cambridge University Press, New York (2004), 9; 54.

<sup>4</sup> Arie Freiberg, *Sentencing Review: Discussion Paper*, Department of Justice, Melbourne (2001), 2.

## **APPENDICES AND BIBLIOGRAPHY**

## APPENDIX A

### Funding application to the Australian Research Council

The topic for this thesis arose from a successful research grant to the Australian Research Council by Professor Kate Warner and Terese Henning, who co-supervised my candidature, and Richard Bingham, then Secretary of the Tasmanian Department of Justice and Industrial Relations.

The aim of the project was to explore the following issues:

- How are suspended sentences used by judges and magistrates?
- What impact do suspended sentences have on the prison population?
- Is there an increase in the length of a sentence of imprisonment when it is wholly suspended?
- Is a suspended sentence merely a slap on the wrist? In other words how are breaches dealt with?
- How effective is the suspended sentence as a specific deterrent or reformative measure? One feature of the suspended sentence in Tasmania is that they are frequently used in combination with other sentencing options such as probation, fines or community service orders. This provides the opportunity to compare the effectiveness of suspended sentences and suspended sentences with different combinations of sentencing option.<sup>1</sup>

The following section in the application guided much of my methodology:

#### Data collection

Both Supreme Court and Magistrates Court data (there is no intermediate court in Tasmania) will be collected. The Supreme Court data are available from the Supreme Court's sentencing database. Electronic sentencing data for the Magistrates Courts will be available from the CRIMES database for the whole of the State from 1 July 2002. The sample will comprise all offenders sentenced to imprisonment in the Supreme Court for a 2-year period (2001 and 2002) and all sentences of imprisonment imposed in Magistrates Courts from 1 July 2002-30 June 2003.

The following information will be extracted in the first instance:

- Type of crime (most serious)
- Name of sentencer
- Name of offender
- Age of offender
- Length of sentence
- Whether wholly or partly suspended
- Conditions of suspension
- Operative [sic] period
- Whether combined with other sentencing options.

In Year 3 the following will be extracted from CRIMES:

- Reconvictions within a two year period
- Breach proceedings during the period of suspension
- The outcome of the breach proceedings.
- The Police Tasmania criminal history database will also be used to access the prior criminal record of offenders in the sample.

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<sup>1</sup> Kate Warner, Terese Henning and Richard Bingham, *An Evaluation of Suspended Sentences of Imprisonment*, Australian Research Council Linkage-Projects (Round Two) Application Form for Funding Commencing in 2003, Project ID: LP0349240 (2002), 29.

## **APPENDIX A**

### **Funding application to the Australian Research Council**

#### **Interviews with Magistrates and Judges**

All Magistrates and Judges in Tasmania will be interviewed to determine their approach to suspending sentences of imprisonment. The aim is to determine if the orthodox legal approach to suspended sentences – the approach ordained by appellate decisions – is the approach that is used in practice. In other words do sentencers use the suspended sentence as an alternative to imprisonment having first determined that a sentence of imprisonment is the appropriate sanction or is it viewed as a sentencing option in its own right.

#### **Analysis**

The electronic sentencing data will be analysed to determine the following:

##### 1. Patterns in the use of suspended sentences

This will include such matters as the length of the term of suspended, conditions of suspension; the proportions of suspended sentences that are combined with other options; relative use of suspended sentences by different magistrates and prior record of offenders.

##### 2. Impact of suspension on length

To determine if there is evidence of sentence escalation, the distribution of the length of wholly suspended sentences will be analysed to see if there is evidence of sentence escalation in cases of suspension. Uneven distribution in sentence lengths of wholly suspended sentences may indicate this.

##### 3. The consequences of breach

Data in relation to reconvictions and breach proceedings will be analysed to determine the proportion of offenders who are breached and the ways in which sentencers exercise their discretion in relation to breach.

##### 4. The efficacy of suspended sentences

Using re-convictions as a measure of effectiveness, imprisonment will be compared with different kinds of suspended sentences (wholly and partly suspended sentences and simple and mingled sentences), controlling for age and previous record.

##### 5. The impact of suspended sentences on the prison population

The way in which sentencers reach a decision to impose a suspended sentence will reveal whether sentencing practice matches sentencing theory and hence shed light on the question whether suspended sentences are a true alternative to imprisonment, in other words, a measure will would result in an immediate sentence of imprisonment in the absence of that option.

##### 6. Possibly changes to the legislative framework for suspended sentences

Interviews with sentencers will explore possible improvements to the legislative framework for suspended sentences. Results of the analysis of patterns of use, consequences of breach and the efficacy of suspended sentences will also inform this discussion.

## APPENDIX B

### Relevant provisions in the *Sentencing Act 1997* (Tas)

#### Division 4 - Suspended sentences

##### **Section 24. Suspended sentence may be conditional**

An order of a court suspending the whole or a part of a sentence of imprisonment may be made subject to such conditions as the court considers necessary or expedient.

##### **Section 25. Effect of a suspended sentence**

(1) A partly suspended sentence of imprisonment is taken for all purposes to be a sentence of imprisonment for the whole term stated by the court.

(2) A wholly suspended sentence of imprisonment is taken to be a sentence of imprisonment for the purposes of all enactments other than enactments providing for disqualification for, or loss of, office or the forfeiture, or suspension, of pensions or other benefits.

(3) If, under section 27, an offender is ordered to serve the whole or part of a wholly suspended sentence of imprisonment then, for the purposes of any enactment providing for disqualification for, or loss of, office or the forfeiture, or suspension, of pensions or other benefits, the offender is taken to have been sentenced to imprisonment on the day on which the order was made under that section.

(4) An offender in respect of whom a suspended sentence has been imposed is not required to serve the sentence or part sentence held in suspense unless the offender is ordered to do so under section 27.

##### **Section 26. Variation of order conditionally suspending sentence**

(1) A court that has made an order suspending a sentence of imprisonment on conditions may, on application under this subsection –

(a) vary the order; or

(b) cancel the order and deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender had it just convicted the offender of that offence or those offences.

(2) Before the court varies or cancels the order it must be satisfied that–

(a) the circumstances of the offender have materially altered since the order was made, as a result of which the offender will not be able to comply with any one or more of the conditions of the order; or

(b) the offender is no longer willing to comply with the order.

(3) If the court cancels the order it must, in determining how to deal with the offender, take into account the extent to which the offender had complied with the order before its cancellation.

(4) An application under subsection (1) may be made by–

(a) the offender or DPP if the sentencing court was the Supreme Court; or

(b) the offender, complainant or police prosecutor if the sentencing court was a court of petty sessions.

(5) Notice of an application under subsection (1) by an offender is to be given to–

(a) the DPP if the sentencing court was the Supreme Court; or

(b) the complainant or police prosecutor if the sentencing court was a court of petty sessions.

(6) Notice of an application under subsection (1) by a complainant or police prosecutor or the DPP is to be given to the offender.

(7) The court may order that a warrant to arrest be issued against the offender if the offender does not attend before the court on the hearing of the application.

##### **Section 27. Breach of order suspending sentence**

(1) If it appears to an authorised person that during the period an order suspending a sentence of imprisonment is in force the offender has breached a condition of the suspended sentence or committed another offence punishable by imprisonment (in this section called “the new offence”, the authorised person may apply to the court that sentenced the offender for an order under this section.

(2) The authorised person must give notice of the application to the offender.

## **APPENDIX B**

### **Relevant provisions in the *Sentencing Act 1997* (Tas)**

- (3) The court may order that a warrant to arrest be issued against the offender if the offender does not attend before the court on the hearing of the application.
- (4) If, on the hearing of the application, the court is satisfied by evidence on oath or by affidavit or by the admission of the offender that the offender has, during the relevant period, breached the condition of the suspended sentence without reasonable excuse or committed the new offence, the court may –
- (a) order that sentence to take effect; or
  - (b) order that a sentence (in this section called the “substituted sentence” take effect in place of the suspended sentence; or
  - (c) by order, vary the conditions on which the execution of the sentence was suspended.
- (5) A substituted sentence may be any sentence that the court could have imposed on the offender had it just found the offender guilty of the offence in respect of which the suspended sentence was imposed, but no greater term of imprisonment is to be imposed by the substituted sentence than was imposed by the suspended sentence.
- (6) If a court orders an offender to serve a term of imprisonment that had been held in suspense, the term of imprisonment must, unless the court otherwise orders, be served–
- (a) immediately; and
  - (b) cumulatively with any other term of imprisonment previously imposed on the offender by that court or any other court.
- (6A) If, under subsection (4)(a), a court orders a sentence to take effect –
- (a) the sentence is taken to be a sentence imposed on the offender as if the court had just found the offender guilty of the offence in respect of which the suspended sentence was imposed; and
  - (b) section 17 applies to that sentence.
- (6B) If, under subsection (4)(b), a court orders that a substituted sentence is to take effect, section 17 applies to the substituted sentence.
- (7) A fine imposed under this section is taken for all purposes to be a fine payable on a conviction of an offence.

## APPENDIX C

### Previous judicial studies on sentencing

The following table represents the key studies on sentencing involving interviews and/or questionnaires with judicial officers:

Study authors	Jurisdiction	Respondents	Mode of research <sup>1</sup>	Topic(s) of interest
Hood (1972) <sup>2</sup>	England	538 magistrates	Interview	Driving offences
Hogarth (1971) <sup>3</sup>	Canada	71 magistrates	Interview	General
Australian Law Reform Commission (1980) <sup>4</sup>	Australia	350 judges and magistrates	Questionnaire	General
Clancy et al (1981) <sup>5</sup>	United States	264 judges	Interview	Sentencing disparity
Kapardis (1981) <sup>6</sup>	England	213 magistrates	Questionnaire, sentencing hypotheticals	General
Ashworth et al (1984) <sup>7</sup>	England	25 judges	Interview, questionnaire	General
Daly (1989) <sup>8</sup>	United States	23 judges	Interview	Sentencing women
Parker, Sumner and Jarvis (1989) <sup>9</sup>	England	233 magistrates	Interview	Sentencing young offenders
Henham (1990) <sup>10</sup>	England	129 magistrates	Interview	General

<sup>1</sup> Note that *Questionnaire* denotes written survey generally administered by post. *Interview* denotes face-to-face interview with judicial officers, although some studies also included telephone interviews. Two studies involved group interviews: Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the mid-1990s*, Home Office Research Study 180, London (1998) and Julian Roberts and Allan Manson, *The Future of Conditional Sentencing: Perspectives of Appellate Judges*, Department of Justice, Ottawa (2004).

<sup>2</sup> Roger Hood, *Sentencing the Motoring Offender*, Heinemann, London (1972).

<sup>3</sup> John Hogarth, *Sentencing as a Human Process*, University of Toronto Press, Toronto (1971).

<sup>4</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report 15 (Interim), Canberra (1980), Appendix B. For background, see Cashman, Peter, *Sentencing Reform: A National Survey of Judges and Magistrates: Preliminary Report*, Law Foundation of New South Wales, Sydney (1979) and Cashman, Peter, *A National Survey of Judges and Magistrates: Technical Report*, Sentencing Research Paper No 10, Australian Law Reform Commission, Sydney (1982).

<sup>5</sup> Kevin Clancy et al, 'Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity' (1981) 72 *Journal of Criminal Law and Criminology* 524.

<sup>6</sup> Andreas Kapardis, 'Magistrates' Opinions, Characteristics and Sentencing' (1981) 145 *Justice of the Peace* 289.

<sup>7</sup> Andrew Ashworth et al, *Sentencing in the Crown Court: Report of an Exploratory Study*, Centre for Criminological Research, University of Oxford (1984).

<sup>8</sup> Kathleen Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3 *Gender and Society* 9.

<sup>9</sup> Howard Parker, Maggie Sumner and Graham Jarvis, *Unmasking the Magistrates: The 'Custody or Not' Decision in Sentencing Young Offenders*, Open University Press, Milton Keynes (1989).

<sup>10</sup> Ralph Henham, *Sentencing Principles and Magistrates' Sentencing Behaviour*, Avebury, Aldershot (1990). See also Ralph Henham, 'The Importance of Background Variables in Sentencing Behaviour' (1988) 15 *Criminal Justice and Behavior* 255.

## APPENDIX C

### Previous judicial studies on sentencing

Study authors	Jurisdiction	Respondents	Mode of research <sup>1</sup>	Topic(s) of interest
Indermaur (1990) <sup>11</sup>	Western Australia	17 judges and magistrates	Interview	Offence seriousness
McCormick and Greene (1990) <sup>12</sup>	Canada	91 judges	Interview	General
Bray and Chan (1991) <sup>13</sup>	NSW	18 judges and 22 magistrates	Interview	Community service orders and periodic detention
Homel and Lawrence (1992) <sup>14</sup>	Australia	8 magistrates	Interview	Drink-driving
Potas and Spears (1994) <sup>15</sup>	NSW	37 judges and 80 magistrates	Questionnaire	Alcohol as a sentencing factor
Lovegrove (1997) <sup>16</sup>	Victoria	8 judges	Interview	Sentencing multiple offenders
Poletti, Spears and Span (1997) <sup>17</sup>	NSW	38 magistrates	Interview	Drink- and drug-driving and speeding
Flood-Page and Mackie (1998) <sup>18</sup>	England and Wales	126 magistrates	Interview	Various, including community sentences
Mears (1998) <sup>19</sup>	United States	5 judges	Interview	Sentencing young offenders
Tata and Hutton (1998) <sup>20</sup>	Scotland	10 sheriffs	Interview	Sentencing disparity
Roberts, Doob and Marinos	Canada	461 judges	Questionnaire	Conditional sentences

<sup>11</sup> David Indermaur, *Perceptions of Crime Seriousness and Sentencing*, Criminology Research Council, Canberra (1990).

<sup>12</sup> Peter McCormick and Ian Greene, *Judges and Judging*, James Lorimer and Company, Toronto (1990).

<sup>13</sup> Rohan Bray and Janet Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in NSW*, Monograph Series, No 3, Judicial Commission of New South Wales, Sydney (1991).

<sup>14</sup> Ross Homel and Jeanette Lawrence, 'Sentencer Orientation and Case Details: An Interactive Analysis' (1992) 16 *Law and Human Behavior* 509.

<sup>15</sup> Ivan Potas and Donna Spears, *Alcohol as a Sentencing Factor: A Survey of Attitudes of Judicial Officers*, Monograph Series, No 8, Judicial Commission of New South Wales, Sydney (1994).

<sup>16</sup> Austin Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making*, Cambridge University Press, Melbourne (1997).

<sup>17</sup> Patrizia Poletti, Donna Spears and David Span, *Magistrates' Attitudes to Drink-Driving, Drug-Driving and Speeding*, Monograph Series, No 14, Judicial Commission of New South Wales, Sydney (1997).

<sup>18</sup> Flood-Page and Mackie, n 1.

<sup>19</sup> Daniel Mears, 'The Sociology of Sentencing: Reconceptualizing Decisionmaking Processes and Outcomes' (1998) 32 *Law and Society Review* 667.

<sup>20</sup> Cyrus Tata and Neil Hutton, 'What "Rules" in Sentencing? Consistency and Disparity in the Absence of "Rules"' (1998) 26 *International Journal of the Sociology of Law* 339.

<sup>21</sup> Julian Roberts, Anthony Doob and Voula Marinos, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey*, Report 2000-10e, Department of Justice, Ottawa (2000).



## APPENDIX C

### Previous judicial studies on sentencing

Study authors	Jurisdiction	Respondents	Mode of research <sup>1</sup>	Topic(s) of interest
(2000) <sup>21</sup>				
Mackenzie (2001) <sup>22</sup>	Queensland	31 judges	Interview	General
Gilchrist and Blissett (2002) <sup>23</sup>	England	67 magistrates	Interview	Domestic violence; stranger assault
Mackie (2003) <sup>24</sup>	England	? magistrates (number not stated)	Interview	Fines
Searle (2003) <sup>25</sup>	New Zealand	65 judges 10 judges	Questionnaire Interview	Fines
Hough, Jacobson and Millie (2003) <sup>26</sup>	England	48 judges	Interview, questionnaire	General
Roberts and Manson (2004) <sup>27</sup>	Canada	18 judges	Interview	Conditional sentences
Tombs and Jagger (2006) <sup>28</sup>	Scotland	5 judges, 34 sheriffs and 1 magistrate	Interview	General
McFarlane and Poletti (2007) <sup>29</sup>	NSW	71 magistrates	Questionnaire	Fines
Jacobson and Hough (2007) <sup>30</sup>	England	40 judges	Interview	Factors in mitigation

See also Julian Roberts and Carol La Prairie, *Conditional Sentencing in Canada: An Overview of Research Findings*, Department of Justice, Ottawa (2000), Ch 2.

<sup>22</sup> Geraldine Mackenzie, *A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing*, (PhD Thesis, University of New South Wales, 2001), later published as Geraldine Mackenzie, *How Judges Sentence*, Federation Press, Sydney (2005).

<sup>23</sup> Elizabeth Gilchrist and Jacqueline Blissett, 'Magistrates' Attitudes to Domestic Violence and Sentencing Options' (2002) 41 *Howard Journal of Criminal Justice* 348.

<sup>24</sup> Alan Mackie et al, *Clearing the Debts: The Enforcement of Financial Penalties in the Magistrates' Courts*, Home Office Online Report 09/03, London (2003).

<sup>25</sup> Wendy Searle, *Court-imposed Fines: A Survey of Judges*, Ministry of Justice, Wellington (2003).

<sup>26</sup> Mike Hough, Jessica Jacobson and Andrew Millie, *The Decision to Imprison*, Prison Reform Trust, London (2003).

<sup>27</sup> Roberts and Manson, n 1.

<sup>28</sup> Jacqueline Tombs and Elizabeth Jagger, 'Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison' (2006) 46 *British Journal of Criminology* 803.

<sup>29</sup> Katherine McFarlane and Patrizia Poletti, *Judicial Perceptions of Fines as a Sentencing Option - A Survey of NSW Magistrates*, Monograph 1, Sentencing Council, Sydney (2007).

<sup>30</sup> Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing*, Prison Reform Trust, London (2007).

## APPENDIX D

### Questions for interviews with judges and magistrates

[Unless otherwise stated, these questions relate to wholly suspended sentences]

#### General issues

1. What do you consider to be the most important objective of suspended sentences?
2. Do you think that a suspended sentence can be (as) effective (as immediate imprisonment) in achieving the following sentencing objectives? Why or why not?
  - Denunciation;
  - Deterrence;
  - Rehabilitation; and
  - Proportionality.
3. What is your reasoning process in deciding to impose a suspended sentence?
4. What sort of cases would you regard as most appropriate for the imposition of a suspended sentence? Can you give an example of a case where, in your view, a suspended sentence would be the *only* appropriate penalty?
5. Are there any circumstances that would make a case particularly *inappropriate* for a suspended sentence?

#### Information and communication

6. To what degree do you think it is necessary in your comments on passing sentence to set out the factors which led you to the suspend the sentence?
7. How do you attempt to communicate the significance of a suspended sentence (as a sentence of imprisonment) to an offender? Do you think there are any ways of improving the court's communication with offenders in this regard?
8. Do you receive any information/feedback on the success rate of suspended sentences. If so, what is it and is it adequate? Do you think your use of suspended sentences as a sentencing option would change if you had more information about the efficacy of a suspended sentence *in each case*?

#### Combination orders

9. How do you regard combination orders, ie attaching CSO, probation, supervision or fines to a suspended sentence? Are there certain types of cases where this is especially appropriate or inappropriate?

#### Special categories of offenders

10. It has been suggested that suspended sentences can be especially useful for certain offenders, for example, those with substance abuse issues, mental illness or gambling problems. What are your views on this issue? Can you think of any ways the efficacy of suspended sentences could be enhanced in such cases?

#### Suspended sentences and imprisonment

11. In some jurisdictions, the relevant legislation provides that a suspended sentence may only be imposed if an unsuspended sentence of imprisonment would be appropriate in all the circumstances. Do you think it would be useful to have a statement to that effect in the *Sentencing Act 1997* (Tas)?
12. Some judges have indicated that one of the major reasons they impose a suspended sentence instead of a sentence of immediate imprisonment is in order to minimise offenders' exposure to the adverse effects of prison. How does such thinking play a part in your own sentencing decisions?

## APPENDIX D

### Questions for interviews with judges and magistrates

13. The majority in *Dinsdale* (2000) 202 CLR 321 held that a sentencer must first determine that a sentence of imprisonment – and not some lesser sentence – is called for, and only then determine whether the term of imprisonment is to be suspended. By contrast, Gleeson CJ and Hayne J in the minority held that the sentencing judge ‘must first decide the kind of punishment to be imposed’. Inferentially, the latter approach would allow a sentencer to increase the term of the sentence to reflect the fact that it has been suspended.

What are your views on this division of opinion? Would it sometimes be appropriate to extend the term of the sentence to reflect the fact of its suspension?

### Public opinion and the media

14. What do you think public attitudes are to suspended sentences? Do you ever consider the impact a suspended sentence may have on public opinion? If so, does this influence your decision-making?
15. The media have described suspended sentences as ‘walking free’, ‘getting off, and ‘avoiding prison’. What, if anything, do you think can be done to improve the image of suspended sentences in the media? Do you think that the name is part of the problem?

### Powers in relation to breaches

16. When an offender is brought back to court for a breach, what factors influence your decision whether to order that the sentence take effect?
17. Should there be a broad discretion, narrow discretion or no discretion to order a sentence to take effect in the event of breach?
18. In some other jurisdictions, the court has the power to initiate action in relation to a suspected breach of its own motion. Do you think it would be beneficial for Tasmanian judicial officers to have such a power?

### Partly suspended sentences

19. How useful do you find partly suspended sentences? In what sort of cases are they especially appropriate/inappropriate?
20. In *Hawkins* [2004] TASSC 55, Slicer J commented that ‘The suspension of portion of a sentence allows for certainty in the date of release and enables the Court to retain power for future transgressions and, to some extent, provide a future form of control.’ Evans J however suggested that ‘When paying regard to matters such as the reform prospects of the recipient of a long sentence, the preferable course is to fix a parole eligibility period’.

How do you see the interaction between non-parole periods and partly suspended sentences? Are there certain cases where you prefer one over the other? Why?

### Federal Offenders

21. What comments, if any, do you have regarding the provisions for recognizance release orders for federal offenders in Part IB *Crimes Act 1914* (Cth)?

### Reform

22. Finally, what legislative, administrative or judicial changes would you like to see in relation to the use of suspended sentences?

## APPENDIX E

### Letter to judges and magistrates

Justice XXX  
Supreme Court of Tasmania  
Salamanca Place  
Hobart 7000

Dear Justice XXX,

Re: An Evaluation of Suspended Sentences: Information Sheet

We would like to invite you to participate in our study of suspended sentences. This project has been funded by the Australian Research Council as a result of a joint application by the University and the Justice Department. The research grant funds a PhD scholarship and the research is being undertaken by Lorana Bartels to fulfil the requirement of a PhD. I am the chief investigator of the project and will be supervising it.

The aim of the project is to explore the use of suspended sentences and it will attempt to evaluate the efficacy of suspended sentences as an alternative to imprisonment. This will involve an examination of a sample of offenders convicted and sentenced to imprisonment by the Supreme Court and Magistrates Courts. Offenders will be followed up for a period of two years following conviction or release from prison (as appropriate) to determine reconviction rates. Issues to be explored include patterns in the use of suspended sentences, the impact of suspension on sentence length, the consequences of breach and the efficacy of different kinds of suspended sentences.

In addition, we would like to interview judges and magistrates to obtain their views on the approach they take in reaching a decision to impose a suspended sentence and to explore any ideas they have in relation to altering the legislative framework for suspended sentences.

We understand that it is somewhat unusual to interview judicial officers about judicial decision-making, but there have been a number of encouraging precedents. The Australian Law Reform Commission had a 75% response rate to its questionnaire on sentencing for its 1980 report. Associate Professor Geraldine Mackenzie of the Queensland University of Technology has recently published *How Judges Sentence*, the results of interviews with Queensland Judges conducted as part of her PhD studies. It is acknowledged that there may be some possibility of identification of interview participants, however the risk of this occurring will be mitigated by not referring to any interviewee by name or including comments which could be used to identify him or her.

A list of the questions proposed to be asked is attached. After participating in the interviews, respondents will be provided with a written transcript of the interview and the opportunity to correct or clarify anything in the transcript. Audiotapes of the interviews will be kept in a locked cabinet at the Law School and will be erased and destroyed after five years (this is the period which the Code of Conduct in Research

requires data to be kept). As noted above, the anonymity of the interviewees will be preserved by not referring to respondents by name. Participants will also be provided with a copy of the results of this research upon request.

Participation in this project is entirely voluntary and will be evidenced by signing the attached consent form before commencing the interview. Participants may decline to answer any question and may withdraw from the study at any time (and withdraw data they have contributed to date).

**APPENDIX E**  
**Letter to judges and magistrates**

I hope that you will be prepared to talk to Ms Bartels about this topic. The interview will take approximately one hour. I am sure that the material obtained from the interviews will enrich the data obtained from the databases on the offenders and make a worthwhile contribution to our knowledge of this sentencing measure.

The project has received ethics approval from the Human Research Ethics Committee (Tasmania) Network. If you have any concerns of an ethical nature about the study, please feel free to contact the Ethics Officer of the Network, Marilyn Knott, on 6226 2764.

If you require any further information about the study or interview, please feel free to contact me. Ms Bartels will contact your associate in the coming weeks to ascertain whether you are willing to participate, and if so, arrange a convenient time to conduct the interview.

Yours sincerely,

Professor Kate Warner  
[kate.warner@utas.edu.au](mailto:kate.warner@utas.edu.au)  
Telephone 6226 2067

## APPENDIX F

### Consent form

#### Title of Project: An Evaluation of Suspended Sentences in Tasmania

1. I have read and understood the Information Sheet for this study.
2. The nature and possible effects of the study have been explained to me.
3. I understand that the study involves an audio-taped and transcribed one hour interview regarding my views on suspended sentences, and that a written transcript of the interview will be provided to me, which I may edit or modify if I wish.
4. I understand that there is a risk of potentially being identified as a participant, but appreciate that this risk will be mitigated by the researchers not referring to any interviewee by name or including comments which could be used to identify him or her.
5. I understand that all research data will be securely stored on the premises of the Faculty of Law at the University of Tasmania premises for five years, and will be erased and destroyed after this time.
6. Any questions that I have asked have been answered to my satisfaction.
7. I agree that research data gathered from me for the study may be published, provided that I am not identified as a participant.
8. I understand that my identity will be kept confidential and that any information I supply to the researcher(s) will be used only for the purposes of the research.
9. I agree to participate in this investigation and understand that I may withdraw at any time without any effect, and if I so wish, may request that any data I have supplied to date be withdrawn from the research.

Name of Participant:

Signature:

Date:

#### Statement by Investigator

☐ I have explained this project and the implications of participation in it to this volunteer and I believe that the consent is informed and that he/she understands the implications of participation

If the Investigator has not had an opportunity to talk to participants prior to them participating, the following must be ticked.

☐ The participant has received the Information Sheet in which my details have been provided so that participants have had opportunity to contact me prior to them consenting to participate in this project.

Name of Investigator:

Signature:

Date:

**APPENDIX G**  
**Abbreviation of ASOC divisions**

ASOC code	ASOC division	Abbreviation
01	Homicide and related offences	Homicide
02	Acts intended to cause injury	Injurious acts
03	Sexual assault and related offences	Sexual assault
04	Dangerous or negligent acts endangering persons	Dangerous acts
05	Abduction and related offences	Abduction
06	Robbery, extortion and related offences	Robbery
07	Unlawful entry with intent	Unlawful entry
08	Theft and related offences	Theft
09	Deception and related offences	Deception
10	Illicit drug offences	Drugs
11	Weapons and explosives offences	Weapons
12	Property damage and environmental pollution	Property damage
13	Public order offences	Public order
14	Road traffic and motor vehicle regulatory offences	Traffic
15	Offences against justice procedures, government security and operations	Justice
16	Miscellaneous offences	Miscellaneous

## APPENDIX H

### ASOC and Tasmanian offence names

Tas offence name	ASOC offence name	ASOC Division	ASOC code
<b>AVIATION OFFENCES</b>			
Interference with a member of the crew of an aircraft	Property damage nec	12: Property damage	1219
<b>Burglary/Stealing/Like Offences</b>			
Aggravated armed robbery	Aggravated robbery	06: Robbery	0611
Aggravated burglary	Unlawful entry with intent/burglary, break and enter	07: Unlawful entry	0711
Aggravated robbery	Aggravated robbery	06: Robbery	0611
Armed robbery	Aggravated robbery	06: Robbery	0611
Being found prepared for the commission of a crime	Criminal intent	13: Public order	1314
Blackmail	Blackmail and extortion	06: Robbery	0621
Burglary	Unlawful entry with intent/burglary, break and enter	07: Unlawful entry	0711
Demanding property with menaces	Blackmail and extortion	06: Robbery	0621
Receiving	Receiving or handling proceeds of crime	08: Theft	0831
Robbery	Non-aggravated robbery	06: Robbery	0612
Stealing	Theft (except motor vehicles), nec	08: Theft	0829
<b>COMMONWEALTH CRIMES</b>			
Defraud the Commonwealth	Fraud, nec	09: Deception	0919
<b>CORPORATIONS OFFENCES</b>			
Fraud against a company as an officer	Commercial/industrial/ financial regulation	16: Miscellaneous	1631
<b>DRUG OFFENCES</b>			
Grow or cultivate prohibited plant	Manufacture or cultivate illicit drugs	10: Drugs	1031
Possess prohibited plant	Possess illicit drug	10: Drugs	1041
Sell or supply narcotic	Deal or traffic in illicit drugs - non-commercial quantity	10: Drugs	1022
Sell or supply prohibited plant or substance	Deal or traffic in illicit drugs - non-commercial quantity	10: Drugs	1022
Traffic in narcotic	Deal or traffic in illicit drugs - commercial quantity	10: Drugs	1021
Traffic in prohibited plant or substance	Deal or traffic in illicit drugs - commercial quantity	10: Drugs	1021
<b>GUNS ACT</b>			
Possession of a gun whilst unlicensed	Unlawfully obtain or possess regulated weapons/explosives	11: Weapons	1121



**APPENDIX H**  
**ASOC and Tasmanian offence names**

Tas offence name	ASOC offence name	ASOC Division	ASOC code
<b>MISCELLANEOUS</b>			
Arson	Property damage by fire or explosion	12: Property damage	1211
Conspiracy	Conspiracy	13: Public order	1315
False threats of danger	Threatening behaviour	16: Miscellaneous	1613
Harbouring	Aiding escape from lawful custody	15: Justice	1511
Nuisance	Disorderly conduct nec	13: Public order	1319
Setting fire to property	Property damage by fire or explosion	12: Property damage	1211
Setting fire to vegetation	Property damage by fire or explosion	12: Property damage	1211
<b>NON-SEXUAL OFFENCES AGAINST THE PERSON</b>			
Aggravated assault	Aggravated assault	02: Injurious acts	0211
Attempted murder	Attempted murder	01: Homicide	0122
Assault	Non-aggravated assault	02: Injurious acts	0212
Dangerous driving causing grievous bodily harm	Other dangerous or negligent acts endangering persons, nec	04: Dangerous acts	0499
Grievous bodily harm	Aggravated assault	02: Injurious acts	0211
Ill treating a child	Neglect of person under care	04: Dangerous acts	0491
Instigating or aiding suicide	Manslaughter	01: Homicide	0131
Manslaughter	Manslaughter	01: Homicide	0131
Murder	Murder	01: Homicide	0111
Unlawful act intended to cause grievous bodily harm	Acts intended to cause injury, nec	02: Injurious acts	0299
Wounding	Aggravated assault	02: Injurious acts	0211
<b>OFFENCES AGAINST GOOD ORDER</b>			
Armed in public	Misuse of regulated weapons/explosives	11: Weapons	1122
Disobedience to a lawful authority	Breach of justice order nec	15: Justice	1519
Embracery	Subvert the course of justice	15: Justice	1521
False declaration	Offences against justice procedures nec	15: Justice	1529
False swearing	Subvert the course of justice	15: Justice	1521
Perverting justice	Subvert the course of justice	15: Justice	1521

**APPENDIX H**  
**ASOC and Tasmanian offence names**

Tas offence name	ASOC offence name	ASOC Division	ASOC code
<b>OFFENCES INVOLVING FRAUD</b>			
Computer-related fraud	Fraud, nec	09: Deception	0919
Dishonestly acquiring a financial advantage	Fraud, nec	09: Deception	0919
False pretences	Non-fraudulent trade practices	09: Deception	0992
Fraud as a clerk or servant	Fraudulent trade practices	09: Deception	0913
Inserting false information as data	Offences against privacy	16: Miscellaneous	1612
<b>SEXUAL OFFENCES</b>			
Aggravated sexual assault	Aggravated sexual assault	03: Sexual assault	0311
Incest	Aggravated sexual assault	03: Sexual assault	0311
Indecency	Offences against public order sexual standards	13: Public order	1325
Indecent assault	Non-aggravated sexual assault	03: Sexual assault	0312
Rape	Aggravated sexual assault	03: Sexual assault	0311
Sexual Intercourse maintaining relationship with person under the age of 17 years.	Non-assaultive sexual offences, nec	03: Sexual assault	0329
Sexual intercourse with person under 17	Aggravated sexual assault	03: Sexual assault	0311
<b>SUMMARY OFFENCES</b>			
Damage to Property	Property damage nec	12: Property damage	1219

# APPENDIX I

## Regression table for reconviction analysis

	B	S.E.	Wald	df	Sig.
<b>Offender age group</b>					
25-34	-0.745	0.245	9.264	1	0.002
35-44	-1.365	0.312	19.182	1	0.000
45-54	-1.896	0.410	21.381	1	0.000
55+	-22.01	7493.826	0.000	1	0.998
<b>Gender</b>					
Male	0.993	0.293	11.460	1	0.001
<b>Prior criminal record</b>					
Nil	-1.886	0.317	35.375	1	0.000
Minor	-1.131	0.308	13.517	1	0.000
<b>Type of index offence</b>					
Violence	-0.198	0.318	0.388	1	0.533
Sexual assault	-0.488	0.513	0.903	1	0.342
Robbery	0.620	0.489	1.604	1	0.205
Property/deception	-0.045	0.345	0.017	1	0.896
Drugs	-0.167	0.404	0.170	1	0.680
<b>Seriousness of index offence</b>					
Minor	-0.825	0.576	2.051	1	0.152
Moderate	-0.497	0.351	2.004	1	0.157
<b>Sentencing judge</b>					
SJ(1)	0.084	0.375	0.051	1	0.822
SJ(2)	0.137	0.352	0.150	1	0.698
SJ(3)	0.167	0.349	0.229	1	0.632
SJ(4)	1.008	0.369	7.447	1	0.006
SJ(5)	0.005	0.436	0.000	1	0.991
<b>Index sentence</b>					
Unuspended sentence	-0.293	0.349	0.704	1	0.402
Partly suspended sentence	-0.717	0.370	3.745	1	0.053
Wholly suspended sentence	-0.779	0.286	7.407	1	0.006
Constant	1.198	0.583	4.219	1	0.040

Note: The following variables were taken as the base variables for this analysis

Age	18-24
Gender	Female
Prior criminal record	Significant
Type of index offence	Other
Seriousness of index offence	Serious
Sentencing judge	SJ(6)
Index sentence	Non-custodial order

Results of the tests for joint significance of the non-binary categorical variables in the model are:

	Wald	df	Sig.
Sentencing judge	11.75	5	0.038
Seriousness of index offence	3.92	2	0.141
Type of index offence	4.20	5	0.521
Prior criminal record	35.9	2	0.000
Index sentence	9.02	3	0.029
Offender age	33.07	4	0.000

**APPENDIX J**  
**Breach cases actioned in 2002-2004**

Date	Offender	Judge on breach	Sex	Age*	Index offence	Breach offence	PSS/WSS	Action on breach
11/7/02		Evans J	M	22	Burglary	Traffic narcotic	WSS	Activated in full
20/8/02	A	Cox CJ	M	43	Assault	GBH; arson; burglary	WSS	Operational period extended
21/8/02	Earley, Nathan	Slicer J	M	20	Aggravated armed robbery	Aggravated burglary and steal; breach of bail	WSS	Activated in full
18/9/02	Williams, Daniel	Evans J	M	22	Armed robbery	'Breached the condition of the suspension'	PSS	Activated in full
8/10/02	Livingston, James	Cox CJ	M	18	Aggravated burglary	Steal	WSS	STROC
23/10/02	Williams, Damien	Cox CJ	M	19	Aggravated burglary, receiving and stealing	Burglary	PSS	Activated in full + sentence resuspended
28/11/02	Jetson, Joseph	Evans J	M	18	Armed robbery	'Breached the condition of the suspension'	PSS	Activated in full
5/12/02	Poole, Kirsten	Underwood J	F	17	Robbery	Attempted robbery	WSS	Activated in full
13/12/02	Hooper, Corey	Slicer J	M	17	Aggravated armed robbery	Steal motor vehicle	WSS^	Sentence resuspended + supervision
27/2/03	Hill, Kaylene	Crawford J	F	15	Aggravated burglary	Aggravated burglary	PSS	Operational period extended
15/4/03	Burns, Clinton	Slicer J	M	17	Manslaughter	Negligent driving; possess drugs; abuse police; resist arrest	WSS	Activated in part + probation
17/4/03	Beeton, Teena	Crawford J	F	23	Armed robbery; supply drugs	Assault police; PCA; minor traffic	PSS	Sentence resuspended
1/8/03	Minney, Anthony	Crawford J	M	26	Indecent assault	Indecent assault	PSS	Activated in full
19/11/03	Law, Drew	Crawford J	M	27	Armed robbery	Assault	PSS	Activated in full
23/6/04	Ebert, Colin	Crawford J	M	32	Traffic drugs	Possess/use drugs	WSS	Operational period extended

\* Age at the time the suspended sentence was imposed

^ This was recorded in the TasinLaw database as a partly suspended sentence but involved a nine month sentence, with one month served in custody backdated and the prospective portion of the sentence suspended. Consistent with my approach in Chapters 5 and 6, I regard this as a wholly suspended sentence.

## APPENDIX K

### Media coverage of research

**ANZSOC newsletter, Volume 4, Issue 1, March 2007, 6-7**

<http://www.anzsoc.org/publications/ANZSOCNewsletter200703.pdf>

Lorana Bartels: The Use of Suspended Sentences in Tasmania.

I am a PhD student at the University of Tasmania. I completed a Bachelor of Arts, Bachelor of Laws and Master of Laws, specializing in Criminal Justice, at the University of New South Wales. I also obtained a Graduate Diploma in Legal Practice at the College of Law and was admitted to practice in the Supreme Court of NSW in 2000. I have worked as a research lawyer for both the NSW Crown Prosecutors Office and Public Defenders Office and as a policy officer at the Criminal Law Review Division of the NSW Attorney General's Department. I am currently engaged as a casual tutor in criminal law at the University of Tasmania, having moved to Tasmania in 2006 to undertake further research related to my PhD.

The Tasmania Law Reform Institute, based in the Faculty of Law at the University of Tasmania, is undertaking an ongoing review of sentencing. As part of this review, funding was obtained from the Australian Research Council to examine suspended sentences. In 2004, I was awarded an Australian Postgraduate Award (Industry), in conjunction with the Tasmanian Department of Justice, to undertake a PhD on the use of suspended sentences in Tasmania. I have the unusual good fortune of having four excellent supervisors on my project - Professor Kate Warner and Terese Henning (Law, UTas), Dr John Davidson (Psychology, UTas) and NSW Magistrate George Zdenkowski as an associate supervisor, who kindly agreed to provide additional support, as I was living in Sydney while enrolled in Tasmania.

My thesis examines the history of suspended sentences and the arguments for and against their use, as well as considering the case law and legislation governing such sentences in Australia and overseas. I expand on the existing literature by undertaking an in-depth quantitative and qualitative analysis of all sentencing decisions in the Tasmanian Supreme Court over a two year period to identify the factors most relevant to the decision to impose a suspended sentence. These cases are then further analysed in a reconviction study, the first study undertaken in Australia to compare reconviction rates for partly and wholly suspended sentences with unsuspended custodial sentences and non-custodial orders. In addition, suspended sentences are examined in a breach analysis to determine the types of offending taking place during the term of the operational period and the administrative and judicial action taken in response to such breaches.

I have also conducted hour-long interviews with all of the Tasmanian Supreme Court judges and most of the Magistrates to discuss a range of issues relating to suspended sentences, including the process for imposing the sentence, the role of public opinion, information and communication about such sentences and powers in relation to breaches. The findings from these de-identified interviews will provide a contextual framework for the empirical analysis in order to develop a comprehensive understanding of the ways suspended sentences are used in practice. I intend to highlight areas of divergence between rhetoric and reality, as well as making some recommendations to enhance the effectiveness of this much maligned and often misunderstood sentencing option.

Email: [lbartels@utas.edu.au](mailto:lbartels@utas.edu.au)

## **APPENDIX K**

### **Media coverage of research**

**Maria Rae, 'Suspended sentences do deter', *The Mercury* (Hobart), 7 December 2007, 39**

MANY criminals who breach their suspended jail sentences slip through the cracks and do not serve their due time, new research has found.

But those who get suspended jail sentences are less likely to reoffend.

University of Tasmania Faculty of Law PhD candidate Lorana Bartels found that both partly and wholly suspended sentences led to lower reconviction rates than other punishments.

Only 57 per cent of those who breached a Supreme Court suspended sentence from 2002 to 2004 had it activated.

"There were instances where the offender was quite clearly in breach but action was not taken to bring them back to court," she said. "It happened a lot more than it should have."

She said the Director of Public Prosecutions and police had been made aware of the research and were taking actions to streamline breach proceedings. She found 40 per cent on a partly suspended sentence, and 41 per cent on a wholly suspended sentence, committed a breach.

Of the Supreme and Magistrates Court cases studied, 62 per cent of people sentenced to jail and 52 per cent of those on non-custodial orders were later reconvicted.

This compared with only 42 per cent on wholly, and 44, per cent on partly suspended sentences.

She said suspended sentences were given to those who had committed a crime that was serious but had compelling personal circumstances. This includes offenders who enrol in drug-treatment programs, have good jobs or become parents.

Suspended sentences were often controversial in the community, she said, because they were considered a "let off". "It's still a prison sentence that is hanging over their head," she said.

"The people who get these sentences seem to be deterred."

The research was funded by the Australian Research Council and the Tasmanian Department of Justice.

## **APPENDIX K**

### **Media coverage of research**

**Zara Dawtrey, 'Suspended sentences seem to work best' *Examiner* (Launceston), 7 December 2007, 21.**

NEW research by the University of Tasmania has found that those who receive suspended sentences are less likely to reoffend than those who receive jail or other penalties.

UTAS law faculty PhD candidate Lorana Bartels analysed all sentencing decisions in the Tasmanian Supreme Court in the 2002 to 2004 financial years, and compared reconviction rates for those who received suspended sentences against imprisonment and non-custodial orders.

Ms Bartels also analysed more than 10,000 cases in the Magistrates Court during the same period.

"Many people think that offenders are not likely to be deterred by a suspended sentence, but my research suggests that such offenders are less likely to continue reoffending than offenders with any other sentencing dispositions," Ms Bartels said yesterday.

"This finding is particularly surprising in respect of offenders on non-custodial orders, for example, probation or community service, where 52 per cent of people were later reconvicted for another offence."

Ms Bartels also investigated the principles behind imposing suspended sentences and interviewed all six Tasmanian Supreme Court judges, and 10 of the 12 magistrates, in what is believed to be the highest interview response on sentencing in the common law world.

"Factors identified as relevant to suspension included prior criminality, good character, rehabilitation, adverse circumstances, supportive relationships, and physical or mental illness," Ms Bartels said.

The Director of Public Prosecutions, Tasmania Police, and the judiciary have all expressed interest in the thesis, which is due early next year.

## **APPENDIX K**

### **Media coverage of research**

**Amber Wilson, 'Suspended sentences finding "no surprise"', *Advocate* (Burnie), 7 December 2007, 11.**

PROMINENT Coastal lawyer Greg Richardson has dismissed as "hardly surprising" a new study showing criminals who get suspended sentences are less likely to reoffend.

University of Tasmania PhD candidate Lorana Bartels analysed all sentencing decisions in the Tasmanian Supreme Court in 2002-04 financial years and compared reconviction rates for those who got suspended sentences as opposed to imprisonment and non-custodial orders.

Ms Bartels also analysed more than 10,000 cases in the Magistrates Court in 2003-04 and interviewed all six Supreme Court judges and 10 magistrates.

She found 62 per cent of people sentenced to jail and 52 per cent of no-custodial orders were later reconvicted, compared to 42 per cent who received wholly suspended sentences, and 44 per cent on partly suspended sentences.

Mr Richardson said the results were obvious to anyone in the legal profession for two reasons.

"One, if somebody is sentenced to a period of actual incarceration, they're more likely to have a longer record of previous convictions than someone getting a chance of a suspended sentence," he said.

"The second reason they're less likely to reoffend - it's logical and commonsense tells you ...if a person is given a chance is left in the community with support of family and probation services, they're less likely to get in trouble than if they're locked up with criminals with expertise."

Mr Richardson said the survey, while comparing "apples with oranges", also proved imprisonment was an inferior method of rehabilitation.

Police Association of Tasmania president Randolph Wierenga said the survey's findings could not prove suspended sentences were necessarily better than other punishment methods.

"Sentences have to take into account the previous crime history of the person, the seriousness of the offence they're being sentenced for and the community expectations of sentencing," Mr Wierenga said.

"There comes a time when you have to draw a line in the sand and say - how many chances will this person get?"



## APPENDIX K

### Media coverage of research

**University of Tasmania Alumni newsletter, Issue 1, 2008, 10**

[http://www.law.utas.edu.au/alumni/LawAlumni\\_University\\_of\\_Tasmania/eNewsletter.html](http://www.law.utas.edu.au/alumni/LawAlumni_University_of_Tasmania/eNewsletter.html)

Postgraduate student Lorana Bartels' PhD thesis, *Sword or Feather: The Use and Utility of Suspended Sentences in Tasmania*, has sparked media and professional interest and debate - even before being submitted. Her research suggests people on suspended sentences are less likely to re-offend than those who receive gaol or other penalties.

As part of her research, Ms Bartels analysed all sentencing decisions in the Tasmanian Supreme Court from 2002-04 and more than 10,000 cases in the Magistrates' Court from 2003-04 and compared reconviction rates for those who received a suspended sentence, unsuspended sentence or non-custodial order in the Supreme Court. She also conducted interviews with the profession, including all six Supreme Court Judges and ten magistrates in what is believed to be the highest interview response on sentencing in the common law world.

The research, found:

- both partly and wholly suspended sentences had lower reconviction rates than other sentencing options;
- those offenders on a wholly suspended sentence who did re-offend were less likely to be convicted for serious offences than other groups.

Factors identified as relevant to suspension included prior criminality, good character, rehabilitation, adverse circumstances, supportive relationships and physical or mental illness.

"Many people think that offenders are not likely to be deterred by a suspended sentence, but my research suggests that such offenders are less likely to continue offending than offenders with any other sentencing disposition," Ms Bartels said.

The DPP, Tas Police and judiciary have all expressed interest in the thesis, which was funded by the Australian Research Council and the Tasmanian Department of Justice, and is due early this year.

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